Supreme Court, U.S.
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No. 04-

In the Supreme Court of the United States

JOHN WALLACE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JASON O. WALLACE, ET AL.,

Petitioners,

v.

OHIO DEPARTMENT OF COMMERCE, DIVISION OF STATE FIRE MARSHAL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether it violates the Fourteenth Amendment's Due Process Clause for a state court to ignore the law that is effective at the time of its decision?

PARTIES TO THE PROCEEDING

Petitioners/Plaintiffs are individuals injured or representatives of individuals killed in a fire on July 3, 1996 at the Flying Dragon fireworks store located in Scottown, Ohio. The Respondent is the Ohio Department of Commerce, Division of Fire Marshal.

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The opinion of the Supreme Court of Ohio denying jurisdiction in this case is reported at 102 Ohio St.3d 1447 and is reproduced in Appendix A, p. 1a. The earlier opinion of the Supreme Court of Ohio reversing and remanding the decision entered by the Ohio Court of Appeals for the Tenth Appellate District is reported at 96 Ohio St.3d 266 and reproduced in Appendix C, p. 27a. The opinion of that Court of Appeals upholding the Ohio Court of Claims' judgment against Petitioners on remand is unreported and is reproduced in Appendix B, p.2a. The earlier opinion of the Court of Appeals affirming the decision of the Court of Claims is unreported and is reproduced in Appendix D, p.85a. The judgment of the Court of Claims is unreported and is reproduced in Appendix E, p.109a

JURISDICTION

The order of the Supreme Court of Ohio denying jurisdiction was entered on May 12, 2004. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio by writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the Constitution of the United States and Ohio Revised Code, Section 2743.02, which are set forth in Appendix F, pp. 131-132.

STATEMENT OF THE CASE

Petitioners/Plaintiffs are individuals injured or representatives of individuals killed in a fire on July 3, 1996 at the Flying Dragon fireworks store located in Scottown, Ohio. Petitioners alleged that the negligence of Respondent/Defendant Ohio Department of Commerce Division of Fire Marshal ("fire marshal"), was the proximate cause of the injuries suffered by Petitioners and their decedents. Todd Hall, a mentally disturbed boy, used a cigarette to ignite fireworks inside the Flying Dragon. The fireworks Hall lit in turn ignited other fireworks and a devastating fire occurred, resulting in the death of nine people and serious injuries to eleven others.

The Flying Dragon was operating under a license issued by the fire marshal. A condition of this license required the Flying Dragon to be equipped with an approved, operable fire suppression system, which includes an automatic sprinkler system. An additional condition of licensure required fire marshal inspectors to make annual and seasonal inspections of the fireworks store. The seasonal inspection was required during the peak firework sales season – between May 15 and July 4 – each year. Safety being the primary concern, seasonal inspections during the peak fireworks sales season always included an inspection of all safety features, including adequacy of exits and the operation of sprinkler systems. A directive issued by the chief fire marshal inspector on May 26, 1996 required that at least one visit be made to each licensed fireworks store during the peak period to monitor overall compliance.

On or about June 7, 1996, the fire marshal received a complaint that the Flying Dragon was illegally selling Class B fireworks. Based on this information, the fire marshal

decided to postpone the seasonal inspection in order to perform a "bust-buy" targeting the illegal fireworks. The bust-buy occurred on June 28, 1996, but the fire marshal agents did not conduct the seasonal inspection upon concluding the bust-buy. The fire marshal also failed to perform the mandated inspection for the remainder of the peak period between June 28, 1996 and July 3, 1996, the day the fire occurred.

Following a bench trial, the Ohio Court of Claims ruled in favor of the fire marshal primarily on the basis that the public duty rule precluded Petitioners from suing the fire marshal for breach of the duty to inspect the fireworks store. On appeal, the Court of Appeals for the Tenth Appellate District affirmed the Court of Claims' decision. In *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St.3d 266, 773 N.E.2d 1018 (2002), however, the Supreme Court of Ohio held that the fire marshal (like all other state agencies) was barred from invoking the public duty rule and remanded the case to the appeals court. The syllabus stated:

> The public-duty rule is incompatible with R.C. 2743.02(A)(1)'s express language requiring that the state's liability in the Court of Claims be determined "in accordance with the same rules of law applicable to suits between private parties." In negligence suits against the state, the Court of Claims must determine the existence of a legal duty using conventional tort principles that would be applicable if the defendant were a private individual or entity.

Id. at 1019. The state supreme court added:

> The language in R.C. 2743.02 that the state shall

> "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties" means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. *However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in performance of that activity or function.* (*Reynolds v. State*, 14 Ohio St.3d 68, 14 OBR 506, 471 N.E.2d 776 (1984), paragraph one of the syllabus approved.)

On remand, the court of appeals rejected Petitioners' claim again and affirmed based on discretionary function immunity, even though there was no evidence of a high level decision not to inspect the store between June 28 and July 3, 1996, and even though all evidence suggested that the fire marshal made the opposite decision. The Supreme Court of Ohio denied review.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THIS COURT TO ARTICULATE THAT IT IS A FEDERAL DUE PROCESS VIOLATION WHEN A STATE COURT FAILS TO APPLY THE LAW IN EFFECT AT THE TIME OF ITS DECISION.

By affirming based on discretionary function immunity and denying review of the appellate court's ruling in favor of

the fire marshal, the court of appeals and the Supreme Court of Ohio, respectively, so far departed from established principles of Ohio law that their decisions violate due process and warrant this Court's intervention. It is particularly important that this Court intervene not only to remedy the Ohio courts' errors, but also to deter other state courts from committing the same due process violation to the detriment of litigants in a variety of contexts across the country.

Specifically, it is important that this Court review this case for the purpose of expressly articulating that it is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution when a state court fails to follow the well-established principle that it must apply the law in effect at the time of its decision. While this Court has long instructed that reviewing courts must adhere to this salutary principle, this Court has never articulated its underlying constitutional basis, namely due process of the law.

A. A State Appellate Court's Failure To Apply the Law in Effect at the Time of the Decision is a Federal Due Process Violation.

It is a fundamental principle of law that a reviewing court is required to apply the law that is in effect at the time of its decision. *See Bradley v. School Bd. of The City of Richmond*, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Auth. Of the City of Durham*, 393 U.S. 268, (1968). A state appellate court's failure to apply the law in effect at the time of the decision is a due process violation because it results in litigants being deprived of fundamental and non-fundamental rights. The state courts deprived Petitioners of both procedural and substantive due process of law by denying them the fundamental right of meaningful access to the courts. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30

(1982); *Boddie v. Connecticut*, 401 U.S. 371, 375-78 (1971). A substantive due process violation occurs where a fundamental right is denied in a manner that does not survive strict scrutiny. *Valot v. Southeast Local Schools Dist.*, 107 F.3d 1220, 1228 (6th Cir.), *cert. denied*, 139 L. Ed. 2d 108 (1997); *see also Galas v. McKee*, 801 F.2d 200, 204 (6th Cir. 1986).

To survive strict scrutiny, the state court's decision must promote a compelling state interest, and the means chosen must be narrowly tailored to meet that goal. *Id.* The Supreme Court of Ohio's action cannot pass strict scrutiny as there can be no compelling interest in ignoring the law it established in *Wallace* v. *Ohio Dept. of Commerce, Div. of State Fire Marshall*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018 (2002).

The Ohio courts also deprived Petitioners of procedural due process of law by denying them the property right of meaningful access to the courts to pursue a cause of action. This property right is protected by the Due Process Clause. *See generally Logan*, 455 U.S. 422, 428-29; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950); *In re Cincinnati Radiation Litig.*, 874 F.Supp. 796, 825 (S.D. Ohio 1995). Interference with pursuing a cause of action violates due process. *Id.* Petitioners' pursuit of their cause of action was substantially impaired by the courts of Ohio.

Petitioners' circumstances are not unique. If this Court does not expressly articulate that failing to apply the law in effect at the time of the decision is a federal due process violation, other litigants in a various contexts will face the same risk of state appellate courts depriving them of their due process rights.

B. Neither the Ohio Court of Appeals Nor the Supreme Court of Ohio Followed the Law in Effect at the Time of Each Court's Decision.

After rejecting the fire marshal's primary ground for affirmance, the public duty doctrine, the Ohio Supreme Court in *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshall*, 96 Ohio St.3d 266, 2002-Ohio-4210, 773 N.E.2d 1018 (2002), left it to the court of appeals "to resolve, if necessary, on remand" the viability of "the state's alternative argument based on the fire marshal's discretionary function immunity." Id. at ¶36. However, the Ohio Supreme Court did not leave the court of appeals without guidance in evaluating that defense.

In paragraph two of the *Wallace* syllabus, the Ohio Supreme Court articulated the standard for evaluating the state's claimed discretionary function immunity in a manner consistent with the Court of Claims Act:

> The language in R.C. 2743.02 that the state shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties" means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. *However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in performance of that activity or function.* (*Reynolds v. State*, 14 Ohio St.3d 68, 14

> OBR 506, 471 N.E.2d 776 (1984), paragraph one of the syllabus approved.)

(Emphasis added). The Ohio Supreme Court also observed that,

> [e]ven without the public-duty rule, the state already enjoys a fair degree of protection from litigious second guessing of *discretionary governmental decisions that necessarily involve difficult choices about how to allocate the state's resources.*

Id. at ¶36 (emphasis added). Then the court specifically addressed the state's defense of discretionary function immunity in this case:

> In this case, for example, *Reynolds* arguably bars liability for the fire marshal's actions if the [plaintiffs'] harm resulted from a *discretionary* executive decision to forgo a seasonal inspection; if, on the other hand, the fire marshal's negligent *performance* of an inspection was the proximate cause of the [plaintiffs'] harm, R.C. 2743.02(A)(1) allows for liability.

Id. (emphasis in original).

Petitioners' claims in this case carefully steer clear of alleging that their harm resulted from "discretionary governmental decisions that necessarily involve difficult choices about how to allocate the state's resources," id., or "from a discretionary executive decision to forgo a seasonal inspection . . . ." Id. The record in the Court of Claims reflects only three material decisions by the fire marshal: (1) the May 24, 1996 directive from the Assistant Chief of the Fire Marshal's Inspection Bureau, Daniel Lehman, head of all

state fire safety inspectors, requiring all inspectors to conduct at least one seasonal (*i.e.*, safety) inspection of all licensed fireworks stores during the period from May 24 to July 4, 1996, (2) the decision to conduct a "bust-buy" operation at the Flying Dragon, and (3) the decision by Lehman that the seasonal inspection of the Flying Dragon would not be performed *until after* the investigators had conducted the "bust-buy" operation, which they completed on June 28, 1996. Assuming, *arguendo*, that each of these decisions reasonably could be classified as "the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion," *Wallace*, supra, at paragraph two of the syllabus, the central question was whether any one or more of these decisions constituted "the proximate cause of the [plaintiffs'] harm," or instead whether that harm proximately resulted from the fire marshal's negligent performance or implementation of a decision already made. *Wallace*, 96 Ohio St.3d at ¶36.[1]

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[1] Because of its resolution of the now-moot public duty issue, the Court of Claims did not resolve that central question as a factual matter. Twice in its Decision, the Court of Claims assumed, *without deciding*, that defendant had acted in a negligent manner by performing or failing to perform an inspection of the Flying Dragon. At page 11 of its Decision, the Court of Claims began its analysis of the public duty rule with the words, "Even if the court were to find that defendant had acted in a negligent manner by performing or failing to perform its duty to inspect . . . ." At page 15 of its Decision, the Court of Claims concluded that the public duty doctrine would preclude state liability "even if defendant's agents were negligent in implementing the discretionary decision to forego [*sic*] a seasonal inspection and conduct the operation . . . ." Given that the Court of Claims indulged these assumptions, *arguendo*, for the sole purpose of deciding the legal issue posed by the public duty rule, it is clear that the Court of Claims did not

There was no evidence that reasonably could support a finding that Petitioners' harm "resulted from a *discretionary* executive decision to forgo a seasonal inspection . . . ." It is undisputed that the decision was not to *forgo* a seasonal inspection of the Flying Dragon *altogether*, but merely to *postpone* it until after the "bust-buy" was completed. It is undisputed that fire safety inspector Thomas Baker, fire safety inspector Michael Kraft, and arson investigator Donald Eifler participated in and completed the "bust-buy" operation at the Flying Dragon on June 28, 1996. It also is undisputed that, at the conclusion of that operation, they revealed themselves to be agents from the fire marshal's office. At that point, they had fully implemented the decision to (1) conduct the "bust-buy" operation and (2) postpone the seasonal inspection until they had done so. With the completion of the "bust-buy," they no longer were acting under the disability that Lehman had imposed when he postponed the seasonal inspection of the Flying Dragon until after the "bust-buy" was completed. In other words, two of the three policy directives mentioned above had been completely fulfilled and were no longer operative.

At the point when the "bust-buy" was completed, the only operative policy decision that fire marshal agents were bound to implement was Lehman's unequivocal directive of May 24, 1996, which required a seasonal inspection of every fireworks store, including the Flying Dragon.[2] The evidence of record

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decide as a factual matter whether plaintiffs' harm "resulted from a *discretionary* executive decision to forgo a seasonal inspection" or instead from "the fire marshal's negligent *performance* of an inspection . . . ." *Wallace*, supra, at ¶36.

[2] The court of appeals' opinion suggests that this directive merely encouraged, as opposed to required, seasonal inspections.

substantiates plaintiffs' contention that, as to the Flying Dragon, that policy decision became operative again immediately upon the completion of the "bust-buy" on June 28, 1996 and it remained operative on June 29, June 30, July 1, July 2, and July 3, 1996.

Petitioners' negligence claim thus falls on the permissible side of the line carefully drawn by the Ohio Supreme Court in the last sentence of paragraph two of the *Wallace* syllabus: that "once the decision has been made to engage in a certain activity or function" – *i.e.*, the decision by Lehman that the Flying Dragon must be inspected for fire safety hazards after the "bust-buy" was completed but before July 4, 1996 – "the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of that activity or function." The fact that fire marshal agents negligently failed to perform a reasonable and proper safety inspection of the Flying Dragon before the fire was not in any way attributable to "discretionary governmental decisions that necessarily involve difficult choices about how to allocate the state's resources." *Wallace*, at ¶36. Rather, to the extent such discretionary decisions are even involved here, the intent of those decisions was to *require* the agents to conduct a proper safety inspection of the Flying Dragon once the "bust-buy" was completed. Thus, this case involves the *negligent performance* of a

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App. A, ¶3. This is at odds with the language of the directive itself – "'[t]he minimal acceptable level of activity is one visit to each facility,'" *Wallace*, at ¶5 – and with the fire marshal's brief before the Supreme Court of Ohio in *Wallace*, which stated at page 5, "In May 1996, the bureau chief issued a directive *mandating* a second, 'cursory,' seasonal inspection – before the Fourth of July holiday." (Emphasis added.)

function or activity that state discretionary decision-making actually *imposed* on the state's agents.

The fire marshal had no evidentiary basis to contest that its agents negligently delayed performing that function or activity. There is no evidence that fire marshal agents Baker, Kraft, and Eifler had not read Lehman's directive, or that they believed it did not apply to the Flying Dragon, or that they lacked the qualifications to detect fire safety hazards at the Flying Dragon, including an inoperative sprinkler system in plain view. On every previous seasonal inspection of the Flying Dragon, an agent from the fire marshal's office had inspected the sprinkler system to ensure that it was turned on and working. But agents Baker, Kraft, and Eifler did not perform any such reasonable and proper safety inspection on June 28, 1996. Not only did they not do so, but neither did any other agent from the fire marshal's office over the ensuing five days. Had any agent done a proper safety inspection as contemplated by Lehman's "seasonal inspection" directive of May 24, 1996, he or she would have detected that the sprinkler system was turned off.

The negligence of respondent's agents in implementing the policy decision to inspect the Flying Dragon for fire safety hazards began on June 28, 1996 and went uncured for five days, right through the moment the fire started, when the full, horrible consequences of defendant's negligence took hold. The *only* reasonable conclusion to draw from the evidence is that petitioners' harm proximately resulted from "the fire marshal's negligent *performance*" of an activity that respondent itself set in motion, via its own directive to inspect the Flying Dragon after the "bust-buy" was completed but before July 4, 1996. Therefore, the state's discretionary function immunity has no application to plaintiffs' claim in this case.

The court of appeals' opinion consistently fails to distinguish a true *decision*, which can be cloaked with discretionary function immunity, from implementation of the decision, which is not. Whenever discretionary function immunity is asserted as a defense to a claim that state employees negligently failed to carry out some required action, the conduct of the employees charged with carrying out the action must be carefully distinguished from the original decision to carry it out. *Semadeni v. ODOT*, 75 Ohio St.3d 128, 132, 661 N.E.2d 1013, 1017 (1996). Although this Court held in *Garland v. ODOT*, 48 Ohio St.3d 10, 548 N.E.2d 233 (1990), that the state has a reasonable time to carry out a highly discretionary decision, the state can be held liable for *unjustified* delays in implementation once a decision to proceed has been made. *Id.* at 12; *Semadeni*, 75 Ohio St.3d at 132-33; cf. *Reynolds v. State*, 14 Ohio St.3d 68, 471 N.E.2d 776 (1984), syllabus, para. 1. In *Garland*, *Semadeni*, and their progeny, the key question always has been whether the evidence justified the delay in implementing the decision. In other words, did the evidence show that the state, even after making the original decision, still was involved in some discretionary planning, such that the delay in implementation was reasonable? *Garland*, 48 Ohio St.3d at 12. Or did the evidence show that the state either was not actively implementing the decision, or was merely involved in low-level decision-making related to the "time and manner" of performance, such that the delay in implementation could be considered unreasonable and negligent? *Semadeni*, 75 Ohio St.3d at 132-33. The common thread running through *Garland* and *Semadeni* is that both rested on *evidence* concerning why there had been a delay in implementing the decision.

In this case, however, there was no evidence linking the fire marshal office's delay in conducting the seasonal

inspection with some actual high-level decision. The record shows that the decision had been made to do the seasonal inspection as soon as the bust-buy was completed. The record leaves no room to conclude that, by sequencing the seasonal inspection after the bust-buy, the fire marshal had decided that agents did not have to complete the seasonal inspection. Such a conclusion would be no more reasonable than a child who infers from a parental command "Take out the garbage as soon as you finish your homework" that he really is not required to take out the garbage. The decision to postpone the seasonal inspection until after the bust-buy could not reasonably be equated with a decision that no seasonal inspection would be conducted. To the contrary, the only plausible interpretation of the record is that a seasonal inspection was required. Absent plausible evidence of a decision not to conduct a seasonal inspection at all, discretionary function immunity has no application.

Rather than rest on evidence, the court of appeals opinion's application of discretionary function immunity rests purely on *speculation* concerning high-level decisions that *might* have been made and that *might* have been the reasons why the seasonal inspection did not take place before the fire.

First, the opinion speculates that the failure of fire marshal agents to conduct the seasonal inspection might have been due to a decision (presumably after the bust-buy) that a seasonal inspection would not take place at the Flying Dragon before July 4, 1996. App. 8a, ¶17. But, again, there is absolutely no evidence to support the opinion's speculation that such a decision ever was made. To the contrary, Bureau Chief Lehman, who would have made such a decision, had expressly assured Barbara Hess, his subordinate, of just the opposite. It is undisputed he told Hess, the field supervisor in charge of the Flying Dragon, that the seasonal inspection

in fact was planned and would be conducted. Even one of the agents involved in the bust-buy understood that, once the bust-buy was over, the seasonal inspection would take place. There was no evidence that the failure of fire marshal agents to conduct the seasonal inspection was due to a decision after the bust-buy that the inspection would not take place.

Second, and presumably in the alternative, the court of appeals' opinion speculates that the reason why the seasonal inspection did not take place before the fire might have been that the fire marshal's office did not have had enough time to complete it after the bust-buy. App. 8a, ¶17. Although the opinion cites *Garland* as support, this opinion actually is incompatible with *Garland* and *Semadeni*. In *Garland*, the evidence showed that, during the period of the delay in implementation, the state agency "was still performing a discretionary function." 48 Ohio St.3d at 12. Thus, the *Garland* Court held it had a reasonable time to implement its decision-making. Because in *Semadeni* the evidence showed the opposite – that the state agency was simply lax in implementation – the state was not afforded the same leeway. *Garland* and *Semadini* are thus reconcilable with one another, but the court of appeals' opinion is not reconcilable with either.

In this case, there is not a shred of evidence suggesting that the six days that remained in the peak firework sales season were not enough time to conduct a seasonal inspection. Although the court of appeals excused the delay by saying that "obviously schedules must be coordinated," App. 8a, ¶17, the record lends no credence to this excuse. Assistant Chief Lehman had told Supervisor Hess that there would be enough time to conduct the seasonal inspection at the same time as the bust-buy. Moreover, the inspector who usually inspected the Flying Dragon had only one other fireworks store to inspect.

What makes the court of appeals opinion's speculation all the more egregious is that the fire marshal did not even argue before that court that six days were not enough to complete the seasonal inspection. To the contrary, the fire marshal incredibly argued below that "*had the store not burned to the ground, that inspection undoubtedly would have taken place* . . . ." Fire Marshal's Court of Appeals Brief, p. 8 (emphasis added). Not only was there no evidence of insufficient time to do the seasonal inspection, there also was no evidence that, in the period after the bust-buy, the fire marshal's office was still somehow engaged in discretionary decision-making related to the Flying Dragon's seasonal inspection. Again, laying aside the court of appeals' naked speculation, all of the evidence points to inertia and inattentiveness on the part of the fire marshal's office as the cause for its delay in performing the seasonal inspection. It is not consonant with the Due Process Clause, Ohio Revised Code Section 2743.02(A)(1), or the public interest for courts to rescue state agencies from being held accountable for the consequences of their inertia and inattentiveness, given that private citizens enjoy no such leeway. This issue warrants review.

CONCLUSION

Based on the decisions of the Supreme Court of Ohio and the Ohio Court of Appeals denying Petitioners' Constitutional right to pursue their claim, Petitioners respectfully submit that certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF OHIO

No. 04-222

[Filed May 12, 2004]

John Wallace, Individually and as Administrator of the Estate of Jason O. Wallace, et al.,
Appellants,

v.

Ohio Dept. of Commerce, Division of State Fire Marshal.
Appellee.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case.

COSTS:

Docket Fee: $40.00, paid by Waite, Schneider, Bayless, Chesley Co., L.P.A.

(Franklin County Court of Appeals; No. 99AP1303)

/s/
THOMAS J. MOYER
Chief Justice

APPENDIX B

COURT OF APPEALS OF OHIO,
TENTH APPELLATE DISTRICT,
FRANKLIN COUNTY

No. 99AP-1303

[Filed December 18, 2003]

John Wallace, Individually and as Administrator of the Estate of Jason O. Wallace et al.,
Plaintiffs-Appellants,

v.

Ohio Department of Commerce, Division of State Fire Marshal,
Defendant-Appellee.

(C.C. No. 97-01325)
ON REMAND FROM THE OHIO SUPREME COURT
Wallace v. Ohio DOC, 2000 Ohio App. LEXIS 4831 (Ohio Ct. App., Franklin County, Oct. 19, 2000)

JUDGES: PETREE, P.J. BROWN and McCORMAC, JJ., concur.

OPINION

PETREE, P.J.

[¶1] This case is before this court on remand from the Ohio Supreme Court's decision in *Wallace v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 96 Ohio St. 3d 266, 2002 Ohio 4210, 773 N.E.2d 1018 , which reversed *Wallace v. Dept. of Commerce* (Oct. 19, 2000), Franklin App. No. 99AP-1303, 2000 Ohio App. LEXIS 4831.

[¶2] The factual background, procedural history, and testimony underlying this case previously have been reported in both this court's earlier opinion and the Ohio Supreme Court's opinion of *Wallace*. See *Wallace*, Franklin App. No. 99AP-1303, 2000 Ohio App. LEXIS 4831, and *Wallace*, 96 Ohio St.3d 266, at ¶2-11. Accordingly, only a condensed summary is provided here.

[¶3] On July 3, 1996, Todd Hall entered the Ohio River Fireworks store in Scottown, Lawrence County, Ohio, with a lit cigarette. Before store employees could intervene, Hall used the lit cigarette to set fire to a stack of "crackling wheel" fireworks, which, in turn, ignited other fireworks within the store. A fire resulted that killed nine people and injured several others.[1] At the time of the fire, Flying Dragon, Inc., possessed a valid fireworks wholesaler license, which had been issued by the fire marshal, to operate the Ohio River Fireworks store. In October 1995, the Ohio River Fireworks

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[1] See *Wallace*, 96 Ohio St.3d 266, at ¶2, fn. 1. (Hall was later indicted on multiple counts of involuntary manslaughter and aggravated arson. Additionally, Hall, who suffers from a severe mental disorder, has been found incompetent to stand trial.)

store had been inspected by the fire marshal as required by statute. See, generally, R.C. 3743.16. Additionally, prior to 1996, as a matter of internal policy, fire marshal inspectors were encouraged to make seasonal inspections of fireworks businesses during the July 4th fireworks season to ensure compliance with applicable statutes and regulations. During the spring of 1995, two seasonal inspections were conducted, and the store's sprinkler system was determined to be functional.

[¶4] In June 1996, after a commercial competitor informed the fire marshal that Ohio River Fireworks was advertising and selling Class B fireworks[2] to parties that were unauthorized to purchase them, Michael Kraft, then an acting field supervisor, organized a "bust buy" operation, during which fire marshal agents would try to purchase Class B fireworks without a proper license. A seasonal inspection of the Ohio River Fireworks store was postponed until after the "bust buy" was completed and was not performed prior to the fire on July 3, 1996.

[¶5] On June 28, 1996, five days before the fatal fire, Donald Eifler, an arson investigator, and Thomas Baker and Michael Kraft, two fire safety inspectors, conducted a "bust buy," during which Eifler purchased Class B fireworks without a proper license. None of the three fire marshal agents who were present at the "bust buy" conducted a fire inspection at any time that day.

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[2] Class B fireworks are now referred to as "1.3G fireworks." See 1997 Am.Sub.H.B. No. 215, 147 Ohio Laws Part I, 1325-26, 1353.

[¶6] Following the fatal fire, plaintiffs, persons injured in the fire and administrators of the decedents' estates, filed a lawsuit in the Ohio Court of Claims, alleging negligence against the state fire marshal.

[¶7] At trial, plaintiffs presented testimony that suggested the store's sprinkler system was shut off at the time of the fire and this shutdown was not an isolated occurrence. Additionally, plaintiffs presented expert opinion testimony that decedents would have had an improved chance of survival if the sprinkler system had functioned properly. Moreover, plaintiffs presented evidence that, at the time of the "bust buy," state fire marshal agents could have easily determined whether the store's sprinkler system was operational.

[¶8] After a four-day trial that was limited to the issue of liability, the Court of Claims found in favor of the state fire marshal. On appeal, this court in *Wallace*, supra, affirmed based on an application of the public-duty rule.

[¶9] However, in *Wallace*, 96 Ohio St.3d 266, 2002 Ohio 4210, 773 N.E.2d 1018, the Ohio Supreme Court reversed this court's decision and remanded the cause. Id. at ¶41. See, also, id. at syllabus.

[¶10] In *Wallace*, the Ohio Supreme Court declined to address two issues raised by the parties in that appeal, namely, "(1) the appellants' proposition concerning the proper foreseeability standard in assessing issues regarding proximate causation and (2) the state's alternate argument for affirmance based on the fire marshal's discretionary-function immunity." *Wallace*, 96 Ohio St.3d, at ¶40. The *Wallace* court also noted that "because the court of appeals held that the public-duty rule barred the appellants' claims, it had no

occasion to reach these issues; accordingly, we leave those issues for the court of appeals to resolve, if necessary, on remand." Id.

[¶11] On remand, plaintiffs assert three assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE COURT OF CLAIMS ERRED IN NOT HOLDING THAT THE STATE'S DISCRETIONARY FUNCTION IMMUNITY DOES NOT APPLY TO THE NEGLIGENCE CLAIM ASSERTED BY PLAINTIFFS IN THIS CASE.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS BY RELYING ON THE TESTIMONY OF DEFENDANT'S EXPERT, DR. GEORGE NICHOLS, WHO BASED HIS OPINION OF THE PHYSIOLOGICAL EFFECTS OF THE FIRE SOLELY UPON THE INADMISSIBLE PRIOR OPINION OF DEFENDANT'S EXPERT, DR. JOHN HOFFMAN [sic].

ASSIGNMENT OF ERROR NO. 3:

THE COURT OF CLAIMS ERRED TO THE PREJUDICE OF PLAINTIFFS IN FINDING THAT THE CONDUCT OF A THIRD PARTY WAS AN INTERVENING ACT THAT WAS THE SOLE CAUSE OF THE FIRE IN QUESTION AND THAT THIS ACT WAS NOT FORESEEABLE.

[¶12] Plaintiffs' first assignment of error asserts the trial court erred by not holding the state's discretionary function immunity did not apply to plaintiffs' negligence claim.

[¶13] Under discretionary function immunity, "the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of that activity or function." *Wallace*, 96 Ohio St.3d 266, 2002 Ohio 4210, 773 N.E.2d 1018, paragraph two of the syllabus, approving *Reynolds v. State* (1984), 14 Ohio St.3d 68, 14 Ohio B. 506, 471 N.E.2d 776, paragraph one of the syllabus.

[¶14] Applying *Reynolds*, the *Wallace* court noted:

> * * * In this case, for example, *Reynolds* arguably bars liability for the fire marshal's actions if the appellants' harm resulted from a *discretionary* executive decision to forgo a seasonal inspection; if, on the other hand, the fire marshal's negligent *performance* of an inspection was the proximate cause of the appellant's harm, R.C. 2743.02(A)(1) allows for liability against the state.

Id. at ¶36. (Footnote omitted; emphasis sic.)

[¶15] Here, the fire marshal decided to postpone a seasonal inspection until after the "bust buy" was conducted. (Tr. 1158-1159.) The state fire marshal's decision to postpone

the seasonal inspection was a discretionary executive decision. See *Wallace*, 96 Ohio St.3d, at P36.

[¶16]Nevertheless, plaintiffs contend that after the "bust buy" operation was completed, the original policy decision to seasonably inspect the Ohio River Fireworks store remained operative, and state fire marshal agents were negligent in implementing this policy decision. Plaintiffs further contend this alleged negligence proximately caused harm to plaintiffs.

[¶17] Here, the state fire marshal's decision to postpone a seasonal inspection of the Ohio River Fireworks store was made *after* an earlier directive encouraged fire marshal inspectors to make seasonal inspections of fireworks establishments. Therefore, whether the earlier directive to make a seasonal inspection of the Ohio River Fireworks store was still operational within the original time parameters is open to question. Additionally, after deciding to postpone the seasonal inspection, whether the state fire marshal had a reasonable amount of time before the fatal fire within which to implement the seasonal inspection without incurring tort liability is also debatable. See, e.g., *Garland v. Ohio Dept. of Trans.* (1990), 48 Ohio St.3d 10, 12, 548 N.E.2d 233, rehearing denied, 49 Ohio St. 3d 705, 551 N.E.2d 618 ("holding that once an agency has made a discretionary decision, it has a reasonable amount of time to implement that decision without incurring tort liability"). It was reasonable to delay execution of the seasonal inspection until the "bust buy" was conducted as stated above. Since the "bust buy" was conducted on June 28, 1996, there then commenced a reasonable time thereafter to implement the safety inspection. It was not an abuse of discretion to fail to schedule the safety inspection within five days thereafter (to the date of the fire) as obviously schedules must be coordinated. Therefore, the

trial court did not err in finding discretionary immunity applicable.

[¶18] Accordingly, plaintiffs' first assignment of error is unpersuasive and overruled.

[¶19] Plaintiffs' third assignment of error asserts the trial court erred by (1) finding Todd Hall's act of igniting fireworks with a lit cigarette was an intervening act that was the sole cause of the fire, and (2) Todd Hall's action was unforeseeable.

[¶20] According to former R.C. 2743.02(A)(1):

> The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter * * *.

[¶21] To establish actionable negligence between private parties, a party must show duty, a breach of duty, and injury proximately resulting therefrom. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680, 1998 Ohio 602, 693 N.E.2d 271; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 15 Ohio B. 179, 472 N.E.2d 707; *Wallace*, 96 Ohio St.3d 266, at ¶22.

[¶22] Historically, the issue of foreseeability has been viewed as a factor in both the duty element and proximate cause element of a negligence claim. See, e.g., *Palsgraf v. Long Island RR. Co.* (1928), 248 N.Y. 339, 162 N.E. 99

(Andrews, J., dissenting); see, also, Dobbs, The Law of Torts (2001) 451, Section 182 (observing that "Judge Cardozo and the majority [in *Palsgraf*] insisted that the issue should be cast in the terminology of duty [or negligence] and that the substantive rules should relieve the defendant of liability if harm to the plaintiff was unforeseeable. Judge Andrews and the dissenters thought that the issue should be cast in the terminology of proximate cause and that as a matter of substantive law, foreseeability should *not* be determinative"). (Emphasis sic.)

[¶23] "'Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff.'" *Wallace*, 96 Ohio St.3d 266, at ¶23, quoting *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 98, 543 N.E.2d 1188. " 'There is no formula for ascertaining whether a duty exists. Duty "* * * is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th 3d.1971) pp. 325-326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisted* (1953), 52 Mich.L.Rev. 1, 15)."'" *Wallace*, 96 Ohio St.3d 266, at ¶24, quoting *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, quoting *Weirum v. RKO Gen. Inc.* (1975), 15 Cal.3d 40, 46, 123 Cal.Rptr. 468, 539 P.2d 36. The existence of a duty is a question of law for the court. *Malone v. Miami Univ.* (1993), 89 Ohio App.3d 527, 530, 625 N.E.2d 640, jurisdictional motion overruled, 68 Ohio St. 3d 1410, 623 N.E.2d 567, citing *Mussivand*, supra.

[¶24] Whether a duty exists depends on the foreseeability of the injury. *Menifee*, supra, at 77. As stated in *Menifee*:

> The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. * * * The foreseeability of harm usually depends on the defendant's knowledge. * * *

Id. See, also, *Wallace*, 96 Ohio St.3d 266, at ¶23.

[¶25] When determining whether a defendant should have recognized the risks involved, only those circumstances that a defendant perceived, or should have perceived, at the time of a defendant's action should be considered. *Menifee*, at 77.

[¶26] Additionally, as stated in *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 543 N.E.2d 769:

> Ordinarily, there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise to a duty to control, or between the actor and another which gives the other the right to protection. * * * Thus, liability in negligence will not lie in the absence of a special duty owed by a particular defendant.

Id. at 173-174. (Footnote omitted.) See, also, Restatement of the Law 2d, Torts (1965) 122, Duty to Control Conduct of

Third Persons - General Principle, Section 315;[3] *Wallace*, 96 Ohio St.3d 266, at ¶38 (state defendant, like any private defendant, is protected by traditional tort concepts of duty, and Ohio tort law "requires a special relationship in order to satisfy the duty element in certain types of negligence actions, such as actions based on failure to act or failure to control the conduct of a third person").

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[3] Comment *c* of Section 315 of the Restatement of the Law 2d, Torts (1965), 122 provides that "[t]he relations between the actor and a third person which require the actor to control the third person's conduct are stated in §§ 316-319. The relations between the actor and the other which require the actor to control the conduct of third persons for the protection of the other are stated in §§ 314A and 320."

Sections 316 to 319 of the Restatement of the Law 2d, Torts (1965), concern a duty of a parent to control conduct of a child; duty of a master to control conduct of servant; duty of possessor of land or chattels to control conduct of licensee; and duty of those in charge of a person having dangerous propensities.

Section 314A of the Restatement of the Law 2d, Torts (1965), concerns special relations giving rise to duty to aid or protect, e.g., duties of a common carrier, innkeeper, possessor of land who holds it open to the public, and one who takes custody of another under circumstances such as to deprive the other of normal opportunities for protection.

Section 320 of the Restatement of the Law 2d, Torts (1965), concerns a duty of a person having custody of another to control the conduct of third persons.

Section 315 of the Restatement of the Law 2d, Torts (1965), 122 has been adopted as law in Ohio. *Fed. Steel & Wire Corp.*, supra, at 173, fn. 1.

[¶27] Furthermore, as noted by this court in *Evans v. Ohio State Univ.* (1996), 112 Ohio App.3d 724, 740, 680 N.E.2d 161, appeal not allowed, 77 Ohio St. 3d 1494, 673 N.E.2d 149:

> Concerning criminal acts of a third party which the defendant might reasonably anticipate, "the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant." Prosser & Keeton, [Law of Torts (5 Ed.1984)] at 305. Rather, "it is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed." *Id.* at 313.

[¶28] Here, the state fire marshal did not have a special relationship with plaintiffs or Todd Hall that gave rise to a duty to protect plaintiffs or control the action of Todd Hall. See, generally, Restatement of the Law 2d, Torts (1965), 122, Section 315. Nor, based on the evidence, can we conclude Todd Hall's misconduct, i.e., deliberately igniting the "crackling wheel" fireworks, was to be anticipated.

[¶29] Furthermore, based on our review of the evidence, we find the objective of the June 28, 1996 visit to the Ohio River Fireworks store was to conduct an undercover investigatory operation, not a safety inspection and, on June 28, 1996, state fire marshal safety inspectors did not complete a safety inspection of the fireworks store. See, also, Court of Claims decision, at 16 ("defendant's agents were on the premises for the sole purpose of making a bust-buy and not to perform an inspection"); Court of Claims decision, at 10 ("[a]lthough there was conflicting testimony at trial regarding the amount of time Eifler and Baker remained in the store, it

is clear that their objective was to complete the bust-buy operation and that they did not perform a safety inspection on June 28, 1996"); *Wallace*, 96 Ohio St.3d 266, at P7 ("none of the three fire marshal agents who were present at the "bust buy" conducted a fire safety inspection at any time that day").

[¶30] Nevertheless, plaintiffs contend on June 28, 1996, state fire marshal agents were still negligent because state fire marshal safety inspectors did not observe that the store's sprinkler system was allegedly shut down, a violation which, according to plaintiffs, a reasonable, prudent fire marshal safety inspector would have observed, and state fire marshal safety inspectors did not take reasonable action to remedy this alleged violation and other alleged violations, thereby preventing plaintiffs' harm.

[¶31] Even assuming the sprinkler system's alleged shutdown was plainly visible, because the objective of the June 28, 1996 visit to the fireworks store was to complete an undercover investigatory operation, not a safety inspection, and state fire marshal agents were faced with personal safety concerns associated with the "bust buy" operation, we are not persuaded that, under these circumstances, the fire marshal safety inspectors breached a duty of reasonable care. See Tr. 404 (direct examination of Thomas E. Baker) ("Q. * * * when you're down in Scottown for this bust buy, is there a reason that you didn't remain on the site and conduct the kind of walk-through inspection that you talked about before? A. We were in a hostile situation down there. I felt for my life and I did not want to go any farther, except to get out of there"). See, also, *Mussivand*, supra, at 318 ("the common-law duty of due care is that degree of care which an ordinarily reasonable and prudent person exercises, or is accustomed to exercising, *under the same or similar circumstances*"). (Emphasis added.)

[¶32] Accordingly, based on the foregoing, we conclude state fire marshal agents did not breach a duty of reasonable care to plaintiffs.

[¶33] Furthermore, even assuming on June 28, 1996, the state fire marshal inspectors may have breached a duty of reasonable care, to prevail on a claim of actionable negligence, plaintiffs are still required to prove by a preponderance of the evidence that the state fire marshal's alleged negligence proximately caused plaintiffs harm. See, e.g., *Wallace*, 96 Ohio St 3d 266, at P38, quoting *Jean W. v. Commonwealth* (1993), 414 Mass. 496, 511-512, 610 N.E.2d 305 ("[a] plaintiff must also shoulder the burden of establishing proximate cause, which could be exceedingly difficult in cases where the governmental conduct alleged to have caused injury is particularly attenuated or exacerbated by intervening circumstances. 'Especially in instances where the public employee's purported negligence stems from a failure to prevent or mitigate a harmful situation that he did not cause, a plaintiff's burden of establishing proximate cause will be significant'").

[¶34] "Proximate causation has been described as 'some reasonable connection between the act or omission of the defendant and the damage the plaintiff has suffered.'" *Queen City Terminals, Inc. v. Gen. Am. Trans. Corp.* (1995), 73 Ohio St.3d 609, 618, 1995 Ohio 285, 653 N.E.2d 661, reconsideration denied, 74 Ohio St. 3d 1422, 655 N.E.2d 742, quoting Prosser & Keeton, Law of Torts (5 Ed.1984) 263, Section 41. "The rule of proximate cause '"requires that the injury sustained shall be the natural and probable consequence of the negligence alleged; that is, such consequence as under the surrounding circumstances of the particular case might, and should have been foreseen or anticipated by the wrongdoer as likely to follow his negligent

act."'"*Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614, quoting *Ross v. Nutt* (1964), 177 Ohio St. 113, 114, 203 N.E.2d 118, quoting *Miller v. Baltimore & Ohio Southwestern RR. Co.* (1908), 78 Ohio St. 309, 325, 85 N.E. 499, 6 Ohio L. Rep. 109, overruled on other grounds, *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, 4 Ohio B. 376, 447 N.E.2d 109. See, also, *Mussivand*, supra, at 321, modifying *Jeffers*, supra ("in *Jeffers* * * * we equated foreseeability with proximate cause. This is misleading since they are not equitable. Rather, in order to establish proximate cause, foreseeability must be found").

Unlike duty, which is a question of law, *Malone*, supra, at 530, proximate cause has been described as "usually a mixed question of law and fact to be determined by the jury, under the instructions of the court, although, where the controlling facts are undisputed or conceded, it may be a question of law for the court." *Columbus Ry. Power & Light Co. v. Pickles* (1926), 28 Ohio App. 183, 188, 5 Ohio Law Abs. 516, 162 N.E. 614, citing *Davis, Agt. v. Atlas Assur. Co. Ltd.* (1925), 112 Ohio St. 543, 551, 3 Ohio Law Abs. 332, 147 N.E. 913, and *Lake Shore & Michigan S. Ry. Co. v. Liidtke* (1904), 69 Ohio St. 384, 69 N.E. 653, 1 Ohio L. Rep. 881.

Here, the trial court concluded that "the sole proximate cause of plaintiffs' injuries was Hall's act of arson. Under the totality of the circumstances, this court cannot find that the criminal act of a third party was a foreseeable event for which defendant can be found liable under a negligence theory." Court of Claims decision, at 18-19. However, earlier in its decision, the trial court also stated:

> * * *Given the lethal environment that developed within thirty seconds after the fireworks were ignited,

> the court finds that even a fully functioning sprinkler system would not have *completely* prevented plaintiffs' injuries. However, the court also finds that defendant's argument that an operational sprinkler system would have made little or no difference in the outcome is implausible.

Id. at 5. (Emphasis added.)

[¶37] Thus, although the trial court concluded Todd Hall's arson was the sole proximate cause of plaintiffs' harm, Court of Claims decision, at 18-19, the trial court also suggests an operational sprinkler system might have prevented some of plaintiffs' harm, id. at 5, thereby creating an ambiguity by suggesting the lack of an operational sprinkler system may have also been a proximate cause of plaintiffs' harm.

[¶38] According to Restatement of the Law 2d, Torts (1965) 465, Section 440:

> A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

See, also, Restatement of the Law 2d, Torts (1965), 465, Section 441 (defining intervening force).

[¶39] In *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155, 6 Ohio B. 209, 451 N.E.2d 815, paragraph one of the syllabus, approving and following *Thrash v. U-Drive-It Co.* (1953), 158 Ohio St. 465, 110 N.E.2d 419, paragraph two of the syllabus, the Ohio Supreme Court held:

> Whether an intervening act breaks the causal connection between negligence and injury, thus relieving one of liability for his negligence, depends upon whether that intervening cause was conscious and responsible agency which could or should have eliminated the hazard, and whether the intervening cause was reasonably foreseeable by the one who was guilty of the negligence.

[¶40] Additionally, the *Cascone* court, quoting *Mudrich v. Standard Oil Co.* (1950), 153 Ohio St. 31, 39, 90 N.E.2d 859, further observed:

> "* * * If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone. *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.*, 122 Ohio St. 302, 309, 171 N.E. 327."

Cascone, at 159-160.

[¶41] "Traditionally, an intentional tort committed by a third party constitutes an intervening act which supersedes the negligence of the party creating the risk of harm, and relieves that party from liability." *Volter v. C. Schmidt Co., Inc.* (1991), 74 Ohio App.3d 36, 37, 598 N.E.2d 35, jurisdictional motion overruled sub nom. *Volter v. Cincinnati, Inc.*, 62 Ohio St.3d 1441, 579 N.E.2d 214.

[¶42] Sections 448 and 449 of the Restatement of the Law 2d, Torts (1965) offer additional insight into the nature of liability for third party acts. See, also, *Fed. Steel & Wire Corp.*, supra, at 176.

[¶43] According to Restatement of the Law 2d, Torts (1965) 480, Intentionally Tortious or Criminal Acts Done Under Opportunity Afforded by Actor's Negligence, Section 448:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[4]

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[4] Comments *b* and *c* to Section 448 of Restatement of the Law 2d, Torts (1965), at 481-482, discuss circumstances where a defendant will be liable for the acts of third parties:

"b. When special grounds for anticipating criminal action by third person. There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime. If the situation which the actor should realize that his negligent conduct might create is of either of these two sorts, an intentionally criminal or tortious act of

[¶44] of the Law 2d, Torts (1965) 482, Tortious or Criminal Acts the Probability of Which Makes Actor's Conduct Negligent:

> If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortuous, or criminal does not prevent the actor from being liable for harm caused thereby.[5]

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the third person is not a superseding cause which relieves the actor from liability.

"*c. When actor's negligence consists in creating risk of criminal action by third person.* The actor's conduct may be negligent solely because he should have recognized that it would expose the person, land, or chattels, of another to an unreasonable risk of criminal aggression. If so, it necessarily follows that the fact that the harm is done by such criminal aggression cannot relieve the actor from liability (see § 449). However, it is not necessary that the conduct should be negligent solely because of its tendency to afford an opportunity for a third person to commit the crime. It is enough that the actor should have realized the likelihood that his conduct would create a temptation which would be likely to lead to its commission.

"This is true although the likelihood that such a crime would be committed might not be of itself enough to make the actor's conduct negligent, and the negligent character of the act arises from the fact that it involves other risks which of themselves are enough to make it unreasonable, or from such risks together with the possibility of crime."

[5] Comment *a* to Section 449 provides:

"This Section should be read together with § 302 B, and the Comments to that Section, which deal with the

[¶45] Here, even if state fire marshal agents had performed a seasonal inspection of the Ohio River Fireworks store prior to the fatal fire, such an inspection would not have eliminated the hazard of Todd Hall's intentional igniting of fireworks within the store. Further, there is no evidence to support a finding that state fire marshal agents knew, or should have known, their alleged negligence would have exposed plaintiffs to a risk of criminal aggression.

[¶46] Therefore, notwithstanding ambiguity contained in the trial court's decision concerning proximate cause, as a matter of law, we cannot determine the trial court's finding that Todd Hall's misconduct was the sole proximate cause of plaintiff's harm is against the manifest weight of the evidence. See *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus ("judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence"); *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273 ("an appellate court should not substitute its judgment for that of the trial court when there exists * * * competent and credible

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foreseeable likelihood of the intentional or even criminal misconduct of a third person as a hazard which makes the actor's conduct negligent. As is there stated, the mere possibility or even likelihood that there may be such misconduct is not in all cases sufficient to characterize the actor's conduct as negligence. It is only where the actor is under a duty to the other, because of some relation between them, to protect him against such misconduct, or where the actor has undertaken the obligation of doing so, or his conduct has created or increased the risk of harm through the misconduct, that he becomes negligent."

evidence supporting the findings of fact and conclusions of law rendered by the trial judge").

[¶47] Accordingly, plaintiffs' third assignment of error is not persuasive and is overruled.

[¶48] Plaintiffs' second assignment of error asserts the trial court erred by relying on the testimony of Dr. George Nichols, a defense expert witness, who based his opinion upon the allegedly inadmissible prior opinion of Dr. John Hoffmann, another defense expert witness. Specifically, plaintiffs contend Dr. Hoffmann based his opinion upon an out-of-court experiment that failed to substantially replicate the conditions that existed at the time of the fatal fire. Therefore, plaintiffs reason Dr. Hoffmann's opinion lacked a proper foundation and should have been excluded. Plaintiffs further contend the facts that defense counsel asked Dr. Nichols to assume were taken from Dr. Hoffmann's earlier opinion testimony and, therefore, Dr. Nichols' opinion was impermissibly based on the opinion of the other defense expert witness, Dr. Hoffmann.

[¶49] In general, courts should favor the admissibility of expert testimony whenever such testimony is relevant and Evid.R. 702 criteria are met. *State v. Nemeth* (1998), 82 Ohio St.3d 202, 207, 1998 Ohio 376, 694 N.E.2d 1332. Generally, a determination as to the admissibility of expert testimony is a matter within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 616, 1998 Ohio 178, 687 N.E.2d 735, citing *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 436 N.E.2d 1008. However, a trial court's discretion is not unlimited. *Miller*, at 616. An "abuse of discretion" implies that a court acted in "an unreasonable, arbitrary, or unconscionable manner." *State ex rel. Sartini v.*

Yost, 96 Ohio St. 3d 37, 2002 Ohio 3317, at P21, 770 N.E.2d 584, citing *State v. Herring* (2002), 94 Ohio St.3d 246, 255, 2002 Ohio 796, 762 N.E.2d 940, reconsideration denied, 95 Ohio St. 3d 1423, 2002 Ohio 1737, 766 N.E.2d 163, certiorari denied, 537 U.S. 917, 154 L. Ed. 2d 202, 123 S. Ct. 301.

[¶50] According to Evid.R. 702:

> A witness may testify as an expert if all of the following apply:
>
> * * *
>
> (C) The witness' testimony is based on reliable, scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

[¶51] Here, plaintiffs contend Dr. Hoffmann's out-of-court experiment failed to substantially replicate the conditions that existed at the time of the fatal fire when he conducted his experiment and, therefore, the trial court should have excluded Dr. Hoffmann's opinion.

[¶52] In *Miller*, supra, the Ohio Supreme Court held in paragraph two of the syllabus:

> When an out-of-court experiment is not represented to be a reenactment of the accident and deals with one aspect or principle directly related to the cause or result of the occurrence, the conditions of the accident need not be duplicated.

[¶53] Additionally, in *St. Paul Fire & Marine Ins. Co. v. Baltimore & Ohio RR. Co.* (1935), 129 Ohio St. 401, 195 N.E. 861, paragraph one of the syllabus, the Ohio Supreme Court held:

> Evidence of experiments performed out of court, tending to prove or disprove a contention in issue, is admissible if there is a substantial similarity between conditions existing when the experiments are made and those existing at the time of the occurrence in dispute; dissimilarities, when not so marked as to confuse and mislead the jury, go to the weight rather than the admissibility of the evidence.

[¶54] Here, based on our review of the record, we find Dr. Hoffmann's out-of-court experiment was not represented to be a reenactment per se of the accident. Rather, Dr. Hoffmann's out-of-court experiment dealt with principles concerning the release of gaseous elements from the "crackling wheel" fireworks during the fatal fire. Furthermore, to the extent there were dissimilarities, the trial court found these differences should be applied to the weight of the evidence, instead of admissibility.

[¶55] Applying *Miller* and *St. Paul Fire & Marine Ins. Co.*, we conclude the trial court's admission of Dr.

Hoffmann's out-of-court experiment did not constitute an abuse of discretion. Accordingly, plaintiffs' contention that Dr. Hoffmann's opinion lacked a proper foundation is unpersuasive.

[¶56] Evid.R. 703 provides that "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

[¶57] In *Burens v. Indus. Comm.* (1955), 162 Ohio St. 549, 124 N.E.2d 724, paragraph one of the syllabus, the Ohio Supreme Court held that "the hypothesis upon which an expert witness is asked to state an opinion must be based upon facts within the witness' own personal knowledge or upon facts shown by other evidence."

[¶58] In this case, Dr. Nichols' opinion testimony was based upon evidence elicited by Dr. Hoffmann's experiment and testimony about the experiment that tended to establish the assumption that was posed to Dr. Nichols. We find Dr. Nichols' opinion testimony to have been properly rendered. See, e.g., *State v. Volgares* (May 17, 1999), Lawrence App. No. 98CA6, 1999 Ohio App. LEXIS 2356, dismissed, appeal not allowed, 86 Ohio St. 3d 1489, 716 N.E.2d 721, motion for delayed appeal denied (2000), 89 Ohio St. 3d 1442, 731 N.E.2d 688, citing *Price v. Daughtery* (1982), 5 Ohio App. 3d 157, 160, 5 Ohio B. 339, 450 N.E.2d 296 ("an expert may render an opinion based on a hypothetical question so long as sufficient testimony regarding the facts of the hypothetical have been introduced at trial"); *Mulford-Jacobs v. Good Samaritan Hosp.* (Nov. 20, 1996), Hamilton App. No. C-950634, 1996 Ohio App. LEXIS 5210, citing *Price*, supra ("an expert may base his opinion on an assumption when the assumption has an evidentiary basis upon which the jury can

determine whether such facts have been established"). Cf. *Zelenka v. Indus. Comm.* (1956), 165 Ohio St. 587, 594, 138 N.E.2d 667 ("it is well settled that the opinion of an expert witness cannot be predicated either in whole or in part upon the opinions, inferences and conclusions of others, whether expert or lay witnesses"); *Seley v. G.D. Searle & Co.* (1981), 67 Ohio St.2d 192, 206, 423 N.E.2d 831 (observing that *Zelenka* rule has been subjected to criticism).

[¶59] Therefore, plaintiffs' second assignment of error is unpersuasive and overruled.

[¶60] Accordingly, having overruled all three of plaintiffs' assignments of error, we hereby affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX C

SUPREME COURT OF OHIO

Case No. 2000-2178

[Decided September 4, 2002]

WALLACE ET AL.,
APPELLANTS,

v.

OHIO DEPARTMENT OF COMMERCE,
DIVISION OF STATE FIRE MARSHAL,
APPELLEE.

APPEAL from the Court of Appeals for Franklin County, No. 99 AP-1303.

SYLLABUS: SYLLABUS OF THE COURT

1. The public-duty rule is incompatible with R.C. 2743.02(A)(1)'s express language requiring that the state's liability in the Court of Claims be determined "in accordance with the same rules of law applicable to suits between private parties." In negligence suits against the state, the Court of Claims must determine the existence of a legal duty using conventional tort principles that would be applicable if the defendant were a private individual or entity. (*Hurst v. Ohio Dept. of Rehab. & Corr.* [1995], 72 Ohio St.3d 325, 650 N.E.2d 104, and *Anderson v. Ohio*

Dept. of Ins. [1991], 58 Ohio St.3d 215, 569 N.E.2d 1042, overruled to the extent inconsistent herewith; *Sawicki v. Ottawa Hills* [1988], 37 Ohio St.3d 222, 525 N.E.2d 468, distinguished.)

2. The language in R.C. 2743.02 that the state shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties" means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of that activity or function. (*Reynolds v. State* [1984], 14 Ohio St.3d 68, 14 OBR 506, 471 N.E.2d 776, paragraph one of the syllabus, approved.)

JUDGES: COOK, J. DOUGLAS, F.E. SWEENEY and PFEIFER, JJ., concur. DOUGLAS, J., concurs separately. MOYER, C.J., RESNICK and LUNDBERG STRATTON, JJ., dissent. LUNDBERG STRATTON, J., dissents.

COOK, J.

[¶1] This case asks us to decide whether the state may raise the public-duty rule as a bar to liability in an action in the Court of Claims alleging negligent inspection by the Ohio Department of Commerce, Division of the Fire Marshal ("fire marshal"). Because the public-duty rule is inconsistent with the express language of the Court of Claims Act, we hold that the state may not.

I

[¶2] On July 3, 1996, Todd Hall carried a lit cigarette into the Ohio River Fireworks store in Scottown, Lawrence County, Ohio. Before store employees could intervene, Hall used the cigarette to ignite a stack of "crackling wheel" fireworks. Those fireworks ignited other fireworks in the store and caused a devastating fire, which killed nine people and injured several others.[1] Although the store was equipped with a sprinkler system, the system was disabled at the time of the blaze.

[¶3] On the day of the fire, Flying Dragon, Inc., held a valid fireworks wholesaler license, issued by the fire marshal, to operate the Ohio River Fireworks store. As a condition of licensure, James Saddler, a certified safety inspector employed by the fire marshal, had inspected the Ohio River Fireworks store in October 1995 as required by statute. See R.C. 3743.16. During the mandatory licensing inspection, Saddler had tested the store's sprinkler system and found it to be operational. Saddler noted no safety violations and recommended approving the store's license renewal application.

[¶4] In addition to the mandatory annual licensing inspection, Ohio River Fireworks was also subject to R.C. 3743.21(A), which authorizes the fire marshal to inspect a licensed wholesaler's premises at any time during the license

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[1] A Lawrence County grand jury later indicted Hall on multiple counts of involuntary manslaughter and aggravated arson. See *State v. Hall* (2001), 141 Ohio App.3d 561, 564, 752 N.E.2d 318. Hall, who suffers from a severe mental disorder, has been declared incompetent to stand trial several times. Id. at 565-566, 752 N.E.2d 318

period.[2] Prior to 1996, as a matter of internal policy, the chief of the fire marshal's code enforcement bureau encouraged inspectors to make seasonal inspections of fireworks establishments during the July 4th fireworks season to ensure compliance with applicable statutes and safety regulations. Under this policy, Saddler performed two such seasonal inspections of the Ohio River Fireworks facility during the spring of 1995 and found the store's sprinkler system to be functional. In May 1996, Daniel L. Lehman, then acting as chief of the fire marshal's code enforcement bureau, reiterated the policy in an interoffice memorandum:

[¶5] "Although the annual licensing inspection is conducted during the renewal period in the fourth quarter of each calendar year, it is important to have every licensed fireworks facility visited by an inspector between now and July 4, 1996. The minimum acceptable level of activity is one visit to each facility, and return visits should be as needed and in consultation with the respective supervisor. The licensed facilities should be appropriately monitored by these cursory inspections to check for overall compliance during this peak period."

[¶6] In June 1996, a commercial competitor of the Ohio River Fireworks store informed the fire marshal that Ohio River Fireworks was advertising and selling Class B fireworks to individuals who were not authorized to purchase them. See former R.C. 3743.45(B), 1995 Am.Sub.S.B. No.

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[2] R.C. 3743.21(A) provides: "The fire marshal may inspect the premises, and the inventory, wholesale sale, and retail sale records, of a licensed wholesaler of fireworks during the wholesaler's period of licensure to determine whether the wholesaler is in compliance with Chapter 3743. of the Revised Code and the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code."

2, 146 Ohio Laws, Part IV, 7647 (forbidding licensed wholesalers to sell Class B fireworks to an Ohio resident who is not a licensed wholesaler, manufacturer, or exhibitor); see, also, R.C. 3743.44(A) (setting forth similar restriction on sales to nonresident purchasers).[3] After learning of this possible violation, Michael Kraft--then acting as the assistant chief of the fire marshal's code enforcement bureau--organized a "buy bust" operation during which fire marshal agents would attempt to purchase Class B fireworks without a proper license. To prevent the planned operation from being compromised, Kraft and Lehman postponed any seasonal inspection of the Ohio River Fireworks store until after they had completed the buy bust. As a result of this directive, Saddler did not perform a seasonal inspection of the Ohio River Fireworks facility prior to the fire.

[¶7] Five days before the fatal fire, arson investigator Donald Eifler posed as a customer at Ohio River Fireworks and successfully purchased Class B fireworks without being required to show authorization to do so. When the buy bust was complete, Kraft retrieved the money used in the operation for evidentiary purposes and ordered the store's proprietor to stop selling Class B fireworks to unauthorized purchasers. None of the three fire marshal agents who were present at the buy bust conducted a fire safety inspection at any time that day.

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[3] The statutory and regulatory nomenclature for fireworks has since changed. The statutes now refer to Class B fireworks as "1.4G fireworks." In addition, fireworks that were formerly referred to as "Class C fireworks" are now known as "1.3G fireworks." See Section 215, 1997 Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 1353.

[¶8] The appellants, persons injured in the fire and administrators of the decedents' estates, filed this lawsuit in the Court of Claims, alleging negligence claims against the fire marshal. The amended complaint alleged, among other things, that the fire marshal was negligent in failing to perform an adequate fire safety inspection on the date of the buy bust and otherwise failing to comply with the internal policy of conducting seasonal inspections during the peak fireworks season. The appellants further alleged that a reasonable inspection by the fire marshal would have revealed the store's inoperable sprinkler system and a host of other fire hazards.

[¶9] At trial, the appellants presented testimony indicating that the store's sprinkler system was turned off at the time of the fire. The appellants also presented testimony suggesting that the shutdown of the sprinkler system was not an isolated occurrence: inspector Thomas Baker testified that he had found the sprinkler system shut down during a "walk through" he performed at the Ohio River Fireworks store in July 1994. In addition, the appellants offered testimony from two experts, who opined that the decedents would have had a good chance of surviving the fire if the sprinkler system had functioned properly. Another expert testified that any one of the fire marshal agents who were present for the buy bust could have easily determined whether the sprinkler system was operational. This expert also added that a safety inspection on the day of the buy bust would have revealed several other fire hazards throughout the store that should have been remedied.

[¶10] Following a four-day trial limited to the issue of liability, the Court of Claims ruled in favor of the fire marshal. In its written opinion, the court gave three distinct reasons for its decision. First, the court found that the fire

marshal's failure to conduct an additional seasonal inspection at the Ohio River Fireworks facility resulted from a "high degree of discretion" exercised by Chief Lehman. The court therefore concluded that liability was precluded by the discretionary-function immunity recognized by this court in *Reynolds v. State* (1984), 14 Ohio St.3d 68, 14 OBR 506, 471 N.E.2d 776, paragraph one of the syllabus. Second, the court found that the public-duty rule precluded liability against the fire marshal. Invoking this court's decision in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468, the Court of Claims ruled that the fire marshal's inspection duties were "owed to the general public" and that the appellants had failed to establish a "special relationship" between them and the fire marshal that would preclude application of the public-duty rule. Finally, the Court of Claims decided that the proximate cause of the appellants' harm was Hall's criminal act of arson. The court concluded that this criminal act "could not have been foreseen by a reasonably prudent person" and thus broke any chain of causation that existed between any negligence by the fire marshal and the harm suffered by the appellants.

[¶11] The appellants appealed to the court of appeals, which found the public-duty rule to be dispositive of the action. The court of appeals held that statutes authorizing inspections by the fire marshal were designed to protect the public generally and not any particular individual. The court further agreed with the Court of Claims that there existed no special relationship between the fire marshal and the injured parties that would preclude application of the public-duty rule. The court of appeals therefore affirmed the Court of Claims' judgment based on the public-duty rule and declared the appellants' remaining assignments of error moot. The cause is now before this court pursuant to the allowance of a discretionary appeal.

II

[¶12] The principal focus of this appeal is the applicability of the public- duty rule to actions against the state and its agencies in the Court of Claims. The appellants argue that the public-duty rule is inconsistent with R.C. 2743.02(A)(1)'s express authorization of suits against the state in the Court of Claims. Alternatively, the appellants argue that the public-duty rule, if available as a defense to negligence actions against the state, functions as a vestige of state sovereign immunity and therefore violates Section 16, Article I of the Ohio Constitution. Finally, the appellants argue that even if the public-duty rule were statutorily and constitutionally valid, the rule is inapplicable to the circumstances in this case.

[¶13] In *Sawicki v. Ottawa Hills*, 37 Ohio St.3d 222, 525 N.E.2d 468, this court addressed whether a municipality could be held liable for negligently failing to provide adequate police protection in response to a call for help from the victim of an attempted rape and robbery. This court held that the village of Ottawa Hills could not be held liable for the negligence alleged because of the public-duty rule. This common-law doctrine, which "originated at English common law and was particularly applied to the office of [the] sheriff," precludes a private party from sustaining a cause of action against a public officer for breach of a public duty. Id. at 229-230, 525 N.E.2d 468; see, also, *South v. Maryland* (1855), 59 U.S. (18 How.) 396, 403, 15 L. Ed. 433. In other words, a public entity owes a duty only to the general public when performing its functions and is therefore not liable for torts committed against an individual absent a special duty owed to the injured person. See *Stone v. North Carolina Dept. of Labor* (1998), 347 N.C. 473, 477-478, 495 S.E.2d 711;

Fudge v. Kansas City (1986), 239 Kan. 369, 372, 720 P.2d 1093.

[¶14] Various public-policy considerations are the principal justification for the doctrine. Primary among these is the protection of the public fisc from lawsuits tending to second-guess the allocation of scarce resources. *Sawicki*, 37 Ohio St.3d at 231, 525 N.E.2d 468. Because individuals, juries, and courts are "ill-equipped to judge governmental decisions as to how particular community resources should be or should have been allocated to protect individual members of the public," courts have used the public-duty rule to shield public entities from the "severe depletion of those resources" that could result from imposing liability for "every oversight or omission" by a public official. *Ezell v. Cockrell* (Tenn.1995), 902 S.W.2d 394, 398; see, also, *Tipton v. Tabor* (S.D.1997), 1997 SD 96, 567 N.W.2d 351, 356. In *Sawicki*, for example, this court observed that there were "insufficient police resources to meet every need" and that "police departments must be able to prioritize and create responses without the benefit of hindsight." *Sawicki*, 37 Ohio St.3d at 231, 525 N.E.2d 468.

[¶15] In adopting the public-duty rule, this court was also careful to distinguish it from the defense of sovereign immunity, which this court had abolished as a common-law defense for municipalities and counties in a series of decisions in the 1980s. See, e.g., *Zents v. Summit Cty. Bd. of Commrs.* (1984), 9 Ohio St.3d 204, 9 OBR 516, 459 N.E.2d 881; *Strohofer v. Cincinnati* (1983), 6 Ohio St.3d 118, 6 OBR 178, 451 N.E.2d 787; *Enghauser Mfg. Co. v. Eriksson Eng. Ltd.* (1983), 6 Ohio St.3d 31, 6 OBR 53, 451 N.E.2d 228. Whereas immunity was an absolute defense to liability when applicable, the public-duty rule "comported with the principles of negligence, and was applicable to the

determination of the extent to which a statute may encompass the duty upon which negligence is premised." *Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d 468; see, also, *Williams v. State* (1983), 34 Cal.3d 18, 22- 23, 192 Cal.Rptr. 233, 664 P.2d 137. Accordingly, the abrogation of common-law immunity for municipalities did not eliminate the public-duty rule, which "was coexistent at common law with the doctrine of sovereign immunity." *Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d 468.

[¶16] The *Sawicki* court also recognized an important common-law exception to the public-duty rule. If a "special relationship" existed between the injured party and the public official--such that the latter assumed an affirmative duty to act on behalf of the former--then the public-duty rule would not bar government liability. Id. at paragraph four of the syllabus; see, also, *Cuffy v. New York City* (1987), 69 N.Y.2d 255, 513 N.Y.S.2d 372, 505 N.E.2d 937. "If a special relationship is demonstrated, then a duty is established, and inquiry will continue into the remaining negligence elements." *Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d 468.

[¶17] Following *Sawicki*, this court extended the public-duty rule beyond the area of local law enforcement to bar governmental liability for alleged negligence in connection with various duties imposed by statute or municipal ordinance. See, e.g., *Delman v. Cleveland Hts.* (1989), 41 Ohio St.3d 1, 534 N.E.2d 835 (point-of- sale housing inspection); *Commerce & Industry Ins. Co. v. Toledo* (1989), 45 Ohio St.3d 96, 543 N.E.2d 1188 (firefighting by municipal fire department); *Williamson v. Pavlovich* (1989), 45 Ohio St.3d 179, 543 N.E.2d 1242 (enforcement of municipal parking ordinance); but, cf., *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112, 118-119, 554 N.E.2d 1301 (finding public-duty rule inapplicable when statute

imposed affirmative duty for the specific benefit of children). And in later decisions, this court extended *Sawicki* beyond actions involving local government. In at least two cases decided in the decade following *Sawicki*, this court applied the public-duty rule to foreclose liability in actions against the state in the Court of Claims. See *Hurst v. Ohio Dept. of Rehab. & Corr.* (1995), 72 Ohio St.3d 325, 650 N.E.2d 104 (applying public-duty rule to bar liability for negligently failing to detain parole violator); *Anderson v. Ohio Dept. of Ins.* (1991), 58 Ohio St.3d 215, 569 N.E.2d 1042 (applying public-duty rule to bar liability for negligent liquidation of assets).[4] And even though a handful of states have rejected the public-duty rule as a bar to government liability,[5] a

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[4] This court also analyzed application of the public-duty rule in *Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation* (1992), 63 Ohio St.3d 648, 590 N.E.2d 730, a case in which numerous county boards of commissioners, boards of education, and auditors sought to hold the Tax Commissioner responsible for alleged misfeasance in assessing and apportioning the values of certain property. A close reading of *Ashland*, however, reveals that this court held that the Court of Claims lacked *subject matter jurisdiction*. 63 Ohio St. 3d at 651-653, 690 N.E.2d 730. Thus, the case's subsequent discussion of the public-duty rule was dicta.

[5] See, e.g., *Adams v. State* (Alaska 1976), 555 P.2d 235; *Ryan v. State* (1982), 134 Ariz. 308, 656 P.2d 597; *Leake v. Cain* (Colo.1986), 720 P.2d 152; *Commercial Carrier Corp. v. Indian River Cty.* (Fla.1979), 371 So. 2d 1010; *Fowler v. Roberts* (La.1990), 556 So. 2d 1; *Jean W. v. Commonwealth* (1993), 414 Mass. 496, 610 N.E.2d 305; *Maple v. Omaha* (1986), 222 Neb. 293, 384 N.W.2d 254; *Doucette v. Bristol* (1993), 138 N.H. 205, 635 A.2d 1387; *Schear v. Bernalillo Cty. Bd. of Commrs.* (1984), 101 N.M. 671, 687 P.2d 728; *Brennen v. Eugene* (1979), 285 Ore. 401, 591 P.2d 719; *Coffey v. Milwaukee* (1976), 74 Wis.2d 526, 247 N.W.2d 132; *DeWald v. State* (Wyo.1986), 719 P.2d 643.

majority of jurisdictions that have considered the question apply the doctrine in some form.[6]

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[6] {¶a} See, e.g., *Williams v. State* (1983), 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137; *Shore v. Stonington* (1982), 187 Conn. 147, 444 A.2d 1379; *Morgan v. Dist. of Columbia* (D.C.App.1983), 468 A.2d 1306; *Ruf v. Honolulu Police Dept.* (1999), 89 Haw. 315, 972 P.2d 1081; *Kolbe v. State* (Iowa 2001), 625 N.W.2d 721; *Fudge v. Kansas City*, 239 Kan. 369, 720 P.2d 1093; *Cracraft v. St. Louis Park* (Minn.1979), 279 N.W.2d 801; *State ex rel. Barthelette v. Sanders* (Mo.1988), 756 S.W.2d 536; *Coty v. Washoe Cty.* (1992), 108 Nev. 757, 839 P.2d 97; *Cuffy v. New York City*, 69 N.Y.2d 255, 513 N.Y.Supp.2d 372, 505 N.E.2d 937; *Catone v. Medberry* (R.I.1989), 555 A.2d 328; *Steinke v. South Carolina Dept. of Labor* (1999), 336 S.C. 373, 520 S.E.2d 142; *Tipton v. Tabor* (S.D.1997), 1997 SD 96, 567 N.W.2d 351; *Rollins v. Petersen* (Utah 1991), 813 P.2d 1156; *Chambers-Castanes v. King Cty.* (1983), 100 Wn. 2d 275, 669 P.2d 451; *Benson v. Kutsch* (1989), 181 W.Va. 1, 380 S.E.2d 36.

{¶b} Five other states--Georgia, Indiana, Michigan, North Carolina, and Vermont--have applied the public-duty rule in a more limited fashion. The supreme courts in Georgia and Indiana have expressly declined to apply the public-duty rule beyond the context of police and emergency services. See *Dept. of Transp. v. Brown* (1996), 267 Ga. 6, 8-9, 471 S.E.2d 849 (limiting *Rome v. Jordan* [1993], 263 Ga. 26, 426 S.E.2d 861); *Benton v. Oakland City* (Ind.1999), 721 N.E.2d 224, 232-234 (limiting *Mullin v. S. Bend* [Ind.1994], 639 N.E.2d 278). Similarly, the Michigan Supreme Court recently refused to extend the public-duty rule beyond cases involving the alleged failure of a police officer to protect a plaintiff from a third person's criminal acts. *Beaudrie v. Henderson* (2001), 465 Mich. 124, 134-142, 631 N.W.2d 308 (limiting *White v. Beasley* [1996], 453 Mich. 308, 552 N.W.2d 1). The North Carolina Supreme Court has embraced the public-duty rule in suits against the *state* but has declined to extend it to suits against *municipalities*. Compare *Stone v. North Carolina Dept. of Labor*, 347 N.C. at 477-479, 495 S.E.2d 711 (applying public-duty rule to

[¶18] Consistent with this line of cases, the state urges us to affirm the lower courts' application of the public-duty rule in this case. Because the fire marshal's inspection duties are owed to the public at large and because the appellants have failed to establish a special relationship as defined in *Sawicki*, the state argues that the public-duty rule is as applicable in this context as it was in the cases in which we have previously applied it. In addition to the state's arguments for affirmance, we are also cognizant of cases from other jurisdictions that have applied the public-duty rule to bar government liability for an allegedly negligent fire inspection--the gravamen of the appellants' claim in this case. See, e.g., *Stone*, 347 N.C. at 480-482, 495 S.E.2d 711; *Cracraft v. St. Louis Park* (Minn.1979), 279 N.W.2d 801, 805-807. Despite all of these factors militating in favor of continued application of the public- duty rule to suits against the state, we cannot adhere to the doctrine without first determining whether it has a place within the statutory scheme created by the legislature in R.C. Chapter 2743.

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bar claim against the state arising out of negligent failure to conduct fire safety inspection), with *Thompson v. Waters* (2000), 351 N.C. 462, 464-465, 526 S.E.2d 650 (declining to extend public-duty rule to insulate county from liability for negligent building inspection). The Vermont Supreme Court has apparently drawn the same distinction as North Carolina. Compare *Sorge v. State* (2000), 171 Vt. 171, 762 A.2d 816, 819-820 (applying public-duty rule and special- relationship exception to an action against the state alleging negligent supervision of juvenile in custody), with *Hudson v. E. Montpelier* (1993), 161 Vt. 168, 179, 638 A.2d 561 (expressly declining to adopt the public-duty rule in an action alleging negligence by municipal employees).

III

[¶19] Although this court has applied the public-duty rule to suits against the state in the Court of Claims, this court has not specifically analyzed whether application of the doctrine is compatible with the express language contained in R.C. Chapter 2743. Of specific importance is R.C. 2743.02(A)(1), which states:

[¶20] "The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with *the same rules of law applicable to suits between private parties*, except that the determination of liability is subject to the limitations set forth in this chapter * * *." (Emphasis added.)

[¶21] The parties do not dispute that R.C. Chapter 2743 does not "set forth" the public-duty rule as a limitation to the state's liability for tortious conduct. The viability of the doctrine in suits against the state therefore depends on whether we can fairly characterize the public-duty rule as a rule of law "applicable to suits between private parties." More specifically, we must decide whether the public-duty rule is compatible with the legal rules governing ordinary negligence suits involving private parties in the common pleas courts. We agree with the appellants that it is not.

[¶22] The appellants in this case seek to hold the fire marshal responsible for damages on a negligent-inspection theory of liability. It is well settled that the elements of an ordinary negligence suit between private parties are (1) the existence of a legal duty, (2) the defendant's breach of that duty, and (3) injury that is the proximate cause of the defendant's breach. *Mussivand v. David* (1989), 45 Ohio

St.3d 314, 318, 544 N.E.2d 265. The duty element of negligence, with which courts have linked the public-duty rule, is a question of law for the court to determine. Id.

[¶23] "Duty, as used in Ohio tort law, refers to the relationship between the plaintiff and the defendant from which arises an obligation on the part of the defendant to exercise due care toward the plaintiff." *Commerce & Industry Ins. Co.*, 45 Ohio St.3d at 98, 543 N.E.2d 1188; see, also, *Huston v. Konieczny* (1990), 52 Ohio St.3d 214, 217, 556 N.E.2d 505. This court has often stated that the existence of a duty depends upon the foreseeability of harm: if a reasonably prudent person would have anticipated that an injury was likely to result from a particular act, the court could find that the duty element of negligence is satisfied. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St.3d 677, 680, 693 N.E.2d 271; *Commerce & Industry*, 45 Ohio St.3d at 98, 543 N.E.2d 1188; *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 75, 77, 15 OBR 179, 472 N.E.2d 707. In addition, we have also stated that the duty element of negligence may be established by common law, by legislative enactment, or by the particular circumstances of a given case. *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 565, 697 N.E.2d 198; *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440, paragraph one of the syllabus. Admittedly, however, the concept of duty in negligence law is at times an elusive one. As this court explained in *Mussivand*:

[¶24] "There is no formula for ascertaining whether a duty exists. Duty '* * * is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th ed.1971) pp. 325-326.) Any

number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall. (Prosser, *Palsgraf Revisited* (1953), 52 Mich.L.Rev. 1, 15).'" Id., 45 Ohio St.3d at 318, 544 N.E.2d 265, quoting *Weirum v. RKO Gen., Inc.* (1975), 15 Cal.3d 40, 46, 123 Cal.Rptr. 468, 539 P.2d 36. See, generally, *Palsgraf v. Long Island RR. Co.* (1928), 248 N.Y. 339, 162 N.E. 99.

[¶25] In light of *Mussivand*'s explanation of the duty element, there is a substantial argument that the public-duty rule is merely an expression of policy that leads us to conclude that private interests are not generally entitled to protection against conduct by public officials performing public duties. See *Shore v. Stonington* (1982), 187 Conn. 147, 152, 444 A.2d 1379. And were we deciding this case in the same context in which we decided *Sawicki*--in an immunity vacuum and applying purely common-law principles--we might be more willing to decide that the public- duty rule "comports with the principles of negligence" by aiding the court in a determination of whether a duty imposed upon a public employee "may encompass the duty upon which negligence is premised." *Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d 468. But unlike in *Sawicki*, our analysis of common-law negligence principles here is tempered by statutory dictates.

[¶26] To accept the state's contention that the public-duty rule is applicable here because it "determines whether a defendant has any duty to begin with" ignores a vital feature of the doctrine that is incompatible with R.C. 2743.02(A)(1). The applicability of the public-duty rule depends upon the public status of the particular defendant raising it as a bar to

liability. In other words, only *governmental* entities and their employees may rely on the rule. It is spurious logic to conclude that a doctrine that is, by definition, available only to *public* defendants can be consistent with a statute mandating that suits be determined in accordance with rules of law applicable to *private* parties. See *Leake v. Cain* (Colo.1986), 720 P.2d 152, 159-160 (holding that the public-duty rule contravened Colorado statute providing that "liability of the public entity shall be determined in the same manner as if the public entity were a private person," Colo.Rev.Stat. 24-10-107); *Brennen v. Eugene* (1979), 285 Ore. 401, 411, 591 P.2d 719 ("any distinction between 'public' and 'private' duty is precluded by statute in this state"). The limitation on liability occasioned by the public-duty rule subjects a plaintiff suing in the Court of Claims to a heightened burden of establishing the duty element of negligence that would not exist if that same plaintiff were suing a private defendant in common pleas court. See *Adams v. State* (Alaska 1976), 555 P.2d 235, 242. Given the unambiguous directive of R.C. 2743.02(A), there is no legal or logical basis to conclude that the public-duty rule, which is by definition unavailable to private litigants, can apply to suits against the state in the Court of Claims.[7]

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[7] Justice Lundberg Stratton's dissenting opinion surmises that our holding, which depends upon the statutory language of R.C. 2743.02(A), could lead to the "unintended consequence" of invalidating Civ.R. 62(C), which permits the state to obtain a stay of a judgment without the necessity of providing a bond. This contention is remarkable, for our holding cannot lead to any such result. It is one thing to say, as we do today, that a *common-law* rule is incompatible with statutory language setting forth the general public policy of Ohio in the area of suits in the Court of Claims. It is quite another thing to contend that *duly enacted* rules or statutes would be equally invalidated. See, e.g., *Rockey v. 84 Lumber Co.*

[¶27] In coming to this conclusion, we acknowledge the contrary interpretation of R.C. 2743.02(A)(1) expressed over twenty-five years ago in *Shelton v. Indus. Comm.* (1976), 51 Ohio App.2d 125, 5 O.O.3d 286, 367 N.E.2d 51. In *Shelton*, also a case alleging an injury resulting from a negligent safety inspection, the court of appeals opted for a narrower interpretation of the language providing for state liability in accordance with the same rules of law applicable to suits between private parties:

[¶28] "Construing that provision more narrowly, one could say that a private party's duty to inspect and to enforce safety standards is not created by statute, but only by virtue of some other legal relationship and, hence, there is no rule of law making a private party liable for a failure to perform statutory duties of inspection and enforcement of safety standards which were enacted to protect the health, safety, and welfare of all of the citizens of Ohio." 51 Ohio App. 2d at 130, 5 O.O.3d 286, 367 N.E.2d 51.

[¶29] Using this reasoning, the court of appeals held that an action could not lie against the Industrial Commission when the breach of duty giving rise to governmental liability arose only by statute. Other courts have used a similar mode of analysis to reconcile the public-duty rule with statutory waivers of sovereign immunity worded similarly to R.C.

(1993), 66 Ohio St.3d 221, 611 N.E.2d 789, paragraph two of the syllabus ("The Ohio Rules of Civil Procedure, which were promulgated by the Supreme Court pursuant to Section 5(B), Article IV of the Ohio Constitution, must control over subsequently enacted inconsistent statutes purporting to govern procedural matters"); R.C. 1.51 (announcing general rule of construction that specific provision controls over a general one when provisions are in irreconcilable conflict).

2743.02(A)(1). See, e.g., *Stone*, 347 N.C. at 478-479, 495 S.E.2d 711. At first glance, the *Shelton* line of reasoning may carry with it some superficial appeal as a way to reconcile R.C. 2743.02(A)(1) with the public- duty rule. We reject this attempted reconciliation, however, because accepting it would run contrary to other areas of Ohio tort law.[8]

[¶30] *Shelton*'s reasoning operates on the unstated premise that statutes creating duties for governmental actors cannot satisfy the duty element for purposes of the state's liability for negligence because there are no statutory duties that may similarly bind private parties. Cases from this court, however, suggest otherwise. We have expressly stated that a duty, for purposes of a negligence claim, may arise out of a legislative enactment. *Chambers*, 82 Ohio St.3d at 565, 697 N.E.2d 198; see, also, *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77, 79, 9 OBR 280, 458 N.E.2d 1262. And this court has cited statutory law as a means of addressing whether the duty element was satisfied in negligence suits against private parties. See, e.g., *Mussivand*, 45 Ohio St.3d at 320, 544 N.E.2d 265; *Shroades v. Rental Homes* (1981), 68 Ohio St.2d 20, 22 O.O.3d 152, 427 N.E.2d 774. Thus, as a general matter, government actors are not alone in having duties imposed upon them by statute. The

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[8] Justice Lundberg Stratton's dissent points to legislative silence following *Shelton* as purported evidence of the General Assembly's endorsement of the court of appeals' interpretation of R.C. 2743.02(A). A legislature does not, however, express its will by *failing* to legislate. "'The act of refusing to enact a law *** has utterly no legal effect, and thus has utterly no place in a serious discussion of the law.'" *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 421, 704 N.E.2d 1217, quoting *United States v. Estate of Romani* (1998), 523 U.S. 517, 535, 118 S. Ct. 1478, 140 L. Ed. 2d 710 (Scalia, J., concurring in part and concurring in judgment).

fact that a statute may impose a duty to act, even if a private person would not have such a duty, "does no more than identify the source of the duty." *Jean W. v. Commonwealth* (1993), 414 Mass. 496, 508, 610 N.E.2d 305 (Liacos, C.J., concurring); see, also, *Beaudrie v. Henderson* (2001), 465 Mich. 124, 140, 631 N.W.2d 308.

[¶31] Accordingly, we hold that the public-duty rule is incompatible with R.C. 2743.02(A)(1)'s express language requiring that the state's liability in the Court of Claims be determined "in accordance with the same rules of law applicable to suits between private parties." In negligence suits against the state, the Court of Claims must determine the existence of a legal duty using conventional tort principles that would be applicable if the defendant were a private individual or entity. This court's decisions applying the public-duty rule in actions brought in the Court of Claims are necessarily overruled to the extent inconsistent with our decision today.[9]

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[9] *Baum v. Ohio State Hwy. Patrol* (1995), 72 Ohio St.3d 469, 650 N.E.2d 1347, is not one of the cases that we overrule today. It is true that *Baum*, which precluded liability for negligence arising out of a state trooper's operation of his vehicle while responding to an emergency call, cited *Sawicki* for the proposition that "liability under R.C. Chapter 2743 cannot be imposed since the action did not result from the breach owed to the particular plaintiff." Id. at 471-472, 650 N.E.2d 1347. *Baum* did not, however, involve the public-duty rule. *Baum* held that the state was *immune* from liability unless a state trooper committed willful or wanton misconduct while operating his or her vehicle in response to an emergency call. Id. at syllabus. If *Baum* had truly hinged on the public-duty rule, there would have been no need for us to address whether the state was entitled to an immunity defense. See *Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d 468.

IV

[¶32] In declaring the public-duty rule inapplicable to suits against the state in the Court of Claims, we are mindful of the various public policies that courts have used to justify application of the rule. Indeed, the public policies that this court cited in *Sawicki*--the integrity of the public fisc and the need to avoid judicial intervention into policy decisions--are as significant now as they were when *Sawicki* was decided. For several reasons, however, the policy rationales that have supported application of the public-duty rule are not as compelling when applied to suits against the state in the Court of Claims.

[¶33] First, no matter what considerations of policy support the *judicial* application of the public-duty rule, we must remember that R.C. Chapter 2743 has *legislatively* set forth the public policy of this state. That policy, expressed in R.C. 2743.02(A)(1), is to allow suits against the state according to the same rules as between private parties, "except that the determination of liability is subject to the *limitations set forth in this chapter*." (Emphasis added.) As we have stated previously, the public-duty rule is neither "set forth" in R.C. Chapter 2743 nor a rule of law applicable to suits between private parties. It is inappropriate for the court to engraft the public-duty rule as an additional limitation on liability that the General Assembly has not provided. If the public-duty rule is to become a rule of substantive law applicable to suits in the Court of Claims, it is the General Assembly--the ultimate arbiter of public policy--that should make it so by way of legislation.[10] It is not this court's role

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[10] See, e.g., *Wilson v. Anchorage* (Alaska 1983), 669 P.2d 569, 571 (noting that the Alaska legislature immunized public entities

to apply a judicially created doctrine when faced with statutory language that cuts *against* its applicability.

[¶34] Second, there are already important safeguards in our jurisprudence that satisfy the public-policy concerns addressed by the public-duty rule. In *Reynolds v. State* (1984), 14 Ohio St.3d 68, 14 OBR 506, 471 N.E.2d 776, a case in which this court squarely addressed the meaning of R.C. 2743.02(A)(1), this court acknowledged that the state's potential liability under R.C. Chapter 2743 is not unbounded. Analogizing to its earlier holdings concerning the limitations on the abrogation of municipal immunity, this court rejected the notion that the General Assembly's abrogation of sovereign immunity in R.C. 2743.02 extended to essential acts of governmental decisionmaking. Id. at 70, 471 N.E.2d 776; see, also, *Enghauser Mfg. Co.*, 6 Ohio St.3d at 35, 6 OBR 53, 451 N.E.2d 228. Accordingly, this court held:

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from liability based on negligent safety inspections of private property following *Adams*, 555 P.2d 235, in which the Alaska Supreme Court refused to recognize the public-duty rule); *Clouse v. State* (2001), 199 Ariz. 196, 199, 16 P.3d 757 (noting that Arizona legislature reinstated immunity for variety of public functions following abrogation of the public-duty rule in *Ryan v. State* [1982], 134 Ariz. 308, 656 P.2d 597); *Persilver v. Louisiana Dept. of Transp.* (La.App.1991), 592 So. 2d 1344, 1347, fn. 2 (noting that Louisiana statute providing immunity for discretionary acts supersedes Louisiana Supreme Court's rejection of public-duty rule in *Fowler*, 556 So. 2d 1); Barry, *Brum v. Town of Dartmouth* and the Public Duty Rule: Navigating an Interpretive Quagmire (2000), 41 B.C. L. Rev. 383, 410-413 (chronicling the Massachusetts legislature's reinstatement of some aspects of the public-duty rule following judicial abrogation of the doctrine in *Jean W.*, 414 Mass. 496, 610 N.E.2d 305)

[¶35] "The language in R.C. 2743.02 that 'the state' shall 'have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of [that activity or function]." *Reynolds* at paragraph one of the syllabus; accord *Garland v. Ohio Dept. of Transp.* (1990), 48 Ohio St.3d 10, 11, 548 N.E.2d 233.

[¶36] The law as set forth in *Reynolds*, which we today reaffirm, addresses public-policy concerns identical to those that courts have used to justify the public- duty rule. That the state already enjoys some measure of qualified immunity for discretionary functions cuts against recognition of an additional rule insulating public entities from liability merely because of their public status. See *Ryan v. State* (1982), 134 Ariz. 308, 310, 656 P.2d 597 (holding that Arizona's statutory immunity for discretionary acts "should allay these fears" that "people will be afraid to act in official capacities" after abrogation of public-duty rule); *Hudson v. E. Montpelier* (1993), 161 Vt. 168, 178-179, 638 A.2d 561 (declining to adopt the public-duty rule as a means of limiting municipal liability when qualified official immunity for discretionary functions already existed). Even without the public-duty rule, the state already enjoys a fair degree of protection from litigious second-guessing of discretionary governmental decisions that necessarily involve difficult choices about how to allocate the state's resources. In this case, for example,

Reynolds arguably bars liability for the fire marshal's actions if the appellants' harm resulted from a *discretionary* executive decision to forgo a seasonal inspection; if, on the other hand, the fire marshal's negligent *performance* of an inspection was the proximate cause of the appellants' harm, R.C. 2743.02(A)(1) allows for liability against the state.[11]

[¶37] Third, and perhaps most significant, our rejection of the public-duty rule's application to suits in the Court of Claims does not automatically open the floodgates to excessive governmental liability. For one thing, the absence of the public-duty rule will not automatically result in new duties--and thereby new causes of action--that could impose tort liability on the state. This court has previously stated that "R.C. 2743.02(A) does not create a new right of action against the state, but places the state upon the same level as any private party." *McCord v. Ohio Div. of Parks & Recreation* (1978), 54 Ohio St.2d 72, 74, 8 O.O.3d 77, 375 N.E.2d 50. Thus, suits against the state are inherently limited by the type of action asserted against it; if the cause of action is not cognizable as between private parties, then there can likewise be no state liability. For instance, actions (unlike this case) that do *not* sound in tort but seek recovery purely for a statutory violation will not necessarily lie against the state--particularly if the statute in question provides no private right

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[11] Thus, Justice Resnick's dissent grossly mischaracterizes (or misunderstands) our holding by insisting that our decision subjects the fire marshal to liability for "deciding to postpone a cursory, discretionary, and seasonal inspection." Infra at P52 (Resnick, J., dissenting). If the dissent's contention were true, it would amount to an implicit overruling of *Reynolds*. Our reaffirmation today of the *Reynolds* syllabus--namely, the recognition that the state cannot be held liable for highly discretionary decisions--refutes any such claim.

of action. Cf. *Smith v. Wait* (1975), 46 Ohio App.2d 281, 283-286, 75 Ohio Op. 2d 560, 350 N.E.2d 431 (finding no state liability in an action alleging violations of statutory provisions concerning registration of securities).

[¶38] For another thing, conventional negligence principles already provide some measure of protection against the possibility of the state becoming the de facto guarantor of every injury somehow attributable to the actions of a state tortfeasor. A state defendant, just like any private defendant, remains protected by traditional tort concepts of duty, including foreseeability and pertinent public-policy considerations. *Leake v. Cain*, 720 P.2d at 160; *Chambers-Castanes v. King Cty.* (1983), 100 Wn. 2d 275, 292, 669 P.2d 451 (Utter, J., concurring in the result). Moreover, our tort law already requires a special relationship in order to satisfy the duty element in certain types of negligence actions, such as actions based on failure to act or failure to control the conduct of a third person. See *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92, 529 N.E.2d 449; *Hill v. Sonitrol of Southwestern Ohio, Inc.* (1988), 36 Ohio St.3d 36, 39, 521 N.E.2d 780; see, also, 2 Restatement of the Law 2d, Torts (1965) 116-122, Sections 314-315.[12] Thus, when a duty is neither imposed by statute nor undertaken by an instrumentality of the state, the state defendant is already insulated from liability based on a failure to act. See, e.g., *Juliano v. Ohio Dept. of Health* (1985), 18 Ohio St.3d 303, 304, 18 OBR 350, 480 N.E.2d 817 (finding

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[12] Our recognition that this principle applies to both state and private defendants renders puzzling the dissent's claim that today's decision somehow imposes an affirmative duty to act upon state defendants that would not exist for private defendants. See infra at P90-93, 95-98, 104-106 (Resnick, J., dissenting). We have said quite the opposite.

no liability for failure to inspect diving board when statute imposed no such duty); cf. *Lopatkovich v. Tiffin* (1986), 28 Ohio St.3d 204, 207, 28 OBR 290, 503 N.E.2d 154 (snow removal ordinance was at most a "duty to assist the city," did not "raise a duty on owners and occupiers to the public at large," and therefore could not form basis for negligence liability). A plaintiff must also shoulder the burden of establishing proximate cause, which could be exceedingly difficult in cases where the governmental conduct alleged to have caused injury is particularly attenuated or exacerbated by intervening circumstances. "Especially in instances where the public employee's purported negligence stems from a failure to prevent or to mitigate a harmful situation that he did not cause, a plaintiff's burden of establishing proximate cause will be significant." *Jean W. v. Commonwealth*, 414 Mass. at 511-512, 610 N.E.2d 305 (Liacos, C.J., concurring); see, also, *Brennen*, 285 Ore. at 408, 591 P.2d 719 ("the requirement that the risk created by the activity of the municipal agent fall with the 'zone of foreseeability' imposes an additional limitation on the scope of governmental liability").

[¶39] For all of these reasons, the public-policy rationales that supported our adoption of the public-duty rule in *Sawicki* do not carry the same force when analyzing whether the doctrine should apply to suits against the state in the Court of Claims. Given the legislature's expression of public policy in the text of R.C. 2743.02(A)(1) and the built-in safeguards against excessive governmental liability already in place, we find no reason to continue *Sawicki*'s extension to suits brought under R.C. Chapter 2743.[13]

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[13] Insofar as *Sawicki* dealt only with municipal liability, we have no occasion to overrule it or any of our decisions applying the

V

[¶40] For the foregoing reasons, we reject the public-duty rule as a bar to the state's liability for negligence in actions brought in the Court of Claims. Because we hold that the public-duty rule is inconsistent with the statutory language of R.C. 2743.02(A)(1), we need not reach the appellants' arguments challenging the constitutionality of the doctrine. See *State ex rel. DeBrosse v. Cool* (1999), 87 Ohio St.3d 1, 7, 716 N.E.2d 1114 ("Courts decide constitutional issues only when absolutely necessary"). We also decline to address two other issues raised by the parties on this appeal: (1) the appellants' proposition concerning the proper foreseeability standard in assessing issues regarding proximate causation and (2) the state's alternate argument for affirmance based on the fire marshal's discretionary- function immunity. Because the court of appeals held that the public-duty rule barred the appellants' claims, it had no occasion to reach these issues; accordingly, we will leave those issues for the court of appeals to resolve, if necessary, on remand.

[¶41] The judgment of the court of appeals is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Judgment reversed and cause remanded.

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public-duty rule to actions *not* brought under R.C. Chapter 2743. Various courts of appeals, however, have considered *Sawicki* (among other cases) to have been legislatively superseded by the General Assembly's enactment of R.C. Chapter 2744. See, e.g., *Sudnik v. Crimi* (1997), 117 Ohio App.3d 394, 397, 690 N.E.2d 925; *Franklin v. Columbus* (1998), 130 Ohio App.3d 53, 59-60, 719 N.E.2d 592; *Amborski v. Toledo* (1990), 67 Ohio App.3d 47, 51, 585 N.E.2d 974.

DOUGLAS, F.E. SWEENEY and PFEIFER, JJ., concur.

DOUGLAS, J., concurs separately.

MOYER, C.J., RESNICK and LUNDBERG STRATTON, JJ., dissent.

LUNDBERG STRATTON, J., dissents.

DOUGLAS, J., concurring.

[¶42] Justice Cook has, with surgical skill, dissected the so-called public- duty rule and, in the process, has shown why the rule has no efficacy or relevance in Ohio. The intellectual honesty of the opinion, drawing its conclusions from the facts as opposed to trying to make the law and facts fit preconceived notions, makes it difficult for the dissenters to mount a credible argument in opposition to the majority opinion. Perhaps that is why both dissents carry on, page after page, citing fact patterns and cases that have no relevance to the case at bar.

[¶43] Justice Cook has, for all to see and understand, explained the clear differences between the doctrine of sovereign immunity as it applies to the state on the one hand, and to municipalities on the other. Yet even though the case now before us involves the state, both dissents continue to confuse the concepts by citing and relying on the inapplicable *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468--a case arising out of municipal tort liability. The failure to grasp this basic distinction is why we now find the law of Ohio to be confused in its application in these types of cases.

[¶44] It would be an easy task to respond to the dissents point by point, but since they both start with a faulty premise and go downhill from there, not much would be gained by doing so. Just one statement from each should suffice.

[¶45] Justice Resnick, in discussing the doctrine of sovereign immunity, states that "it functions to exempt government from the usual liability that flows from the breach of an established duty of care." Well, yes, that is exactly what it does. Justice Resnick says that that is OK. Many of us now say that it is not OK. How one justifies that a governmental entity can injure one of its citizens without liability but if the same injury is caused by a fellow citizen liability attaches escapes many of us and lies at the heart of our disagreement.

[¶46] Justice Stratton says about the majority opinion that "the reasoning is so internally inconsistent that I find it difficult to even argue against." Now that is strange. A proposition that is so internally inconsistent should be an easy mark. It could be, of course, that the lack of any real law contrary to the majority opinion is the reason it is difficult to argue against.

[¶47] But it is not the issue of whether they are wrong and we are right or vice versa that determines the outcome. The outcome is determined by the law of this state and the framers of our Constitution and makers of our statutes. It should not escape interested readers that both dissents, by necessity and convenience, ignore the real law in the case--Section 16, Article I of the Ohio Constitution. In a separate sentence, which seems to have no particular relevance to the other sentence of the section, the framers provided that "suits may be brought against the state, in such courts and in such manner, as may be provided by law." No limitations, other than place and manner, are set forth. No sovereign immunity

exception. No public-duty exception. Nothing but simple language--the state may be sued.

[¶48] Given the constitutional language, nothing more was needed. But maybe just to be sure, the General Assembly enacted R.C. 2743.02(A)(1), which provides that "the state hereby waives its immunity from liability and consents to be sued, and have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *." Justice Cook has now explained what all of that means. The dissenters have ignored the constitutional language.

[¶49] Notwithstanding the constitutional language, the dissenters say that there are limitations on the state's liability and that those limitations come dressed up as the "public-duty rule." If this premise is accepted, then it must logically follow that without a corresponding amendment to the Constitution, the General Assembly could provide that no suit could be brought against the state. This obviously is not and could not be the law.

[¶50] Justice Cook has done the law a great service. The opinion deserves to be supported, not denigrated. I respectfully concur.

ALICE ROBIE RESNICK, J., dissenting.

[¶51] I am hardly one who concedes infallibility to legal precedent, however long or recently established. See, e.g., *Wright v. Bloom* (1994), 69 Ohio St.3d 596, 635 N.E.2d 31 (overruling paragraph two of the syllabus of *In re Estate of Thompson* [1981], 66 Ohio St.2d 433, 20 O.O.3d 371, 423 N.E.2d 90); *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (overruling

paragraph four of the syllabus of *Albain v. Flower Hosp.* [1990], 50 Ohio St.3d 251, 553 N.E.2d 1038). Nor am I inclined to view preexisting conceptions of duty as immutable or sacrosanct. See *Estates of Morgan v. Fairfield Family Counseling Ctr.* (1997), 77 Ohio St.3d 284, 297-298, 673 N.E.2d 1311. But if our decisions are to afford any stability or certainty to the law, then the principles they embrace--those founded on sound reason and well suited to the interest of justice--should not be discarded at will.

[¶52] Today's majority, relying primarily on a statute that is irrelevant to the matter at hand, suddenly abolishes a long-established, well-respected, and prevalent legal doctrine in a case that demonstrates, better than most others, the necessity of its retention. By abandoning the so-called public-duty rule in claims against the state, the majority subjects the fire marshal to liability for deciding to postpone a cursory, discretionary, and seasonal inspection at the Ohio River Fireworks store in order to conduct a "buy bust" to expose that facility's illegal sale of more dangerous Class B fireworks to unauthorized purchasers. By the same token, the majority's decision would apply to subject the fire marshal to liability had he decided to conduct the inspection rather than the buy bust and members of the public were subsequently harmed or killed by Class B fireworks in the hands of an unauthorized purchaser. It is exactly this kind of judicial interference with governmental decision-making and deployment of community resources that marks the public-duty doctrine as a cogent, viable, and compelling feature of the common law. For these and the following reasons, I must respectfully, but strenuously, dissent.

[¶53] The ascendancy of the public-duty doctrine in this country, and its concomitant "special-relationship exception," is often attributed to the United States Supreme Court's

decision in *South v. Maryland* (1855), 59 U.S. (18 How.) 396, 15 L. Ed. 433. In that case, the plaintiff was abducted, held for several days, and released only when he obtained the ransom demanded by his kidnappers. According to the plaintiff, the local sheriff knew he had been kidnapped and where he was detained, yet did nothing to secure his release or arrest the kidnappers. The plaintiff sued the sheriff on his official bond, claiming that "the sheriff did not well and truly execute and perform the duties required of him by the laws" of the state of Maryland. 59 U.S. at 401, 18 How. 396, 15 L. Ed. 433.

[¶54] The plaintiff received a judgment against the sheriff in the circuit court, but the Supreme Court reversed the award. In so doing, the high court held, "It is an undisputed principle of the common law, that for a breach of a public duty, an officer * * * is amenable to the public, and punishable by indictment only." 59 U.S. at 402-403, 18 How. 396, 15 L. Ed. 433. The court noted, however, that an exception may lie where there exists a "special individual right, privilege, or franchise in the plaintiff, from the enjoyment of which he has been restrained or hindered by the malicious act of the sheriff." 59 U.S. at 403, 18 How. 396, 15 L. Ed. 433.

[¶55] A substantial majority of jurisdictions now adhere to the principle that the duties of public officers and employees ordinarily are owed exclusively to the body politic with whom they contracted, and are enforceable only administratively or by criminal proceedings. Those duties are not owed to individuals who may be affected by their breach but on whose behalf the employees have not assumed to act. Accordingly, state or local governmental bodies cannot be held liable at common law for the breach of a duty owed generally to the public as such, but can be held liable for the

breach of a duty owed specially to individual members of the public. Correlatively, a governmental entity cannot be held liable for negligence in failing to enforce or carry out its public duties under a regulatory or penal statute absent a special relationship between the government and the injured plaintiff or a statutory provision to the contrary.

[¶56] At the heart of the public-duty doctrine lies an assemblage of cogent policy considerations that operate to define the extent to which it is economically and socially feasible to subject governmental units to the loss-distributing function of tort law. These considerations include most prominently the need to preserve the already limited governmental resources that are available to protect the public health, safety, and welfare, the principle that courts should not interfere with or second-guess the policy decisions made by the other branches of government, particularly with regard to the proper allocation of community resources and services, and the likelihood that unlimited exposure to liability would threaten effective governmental functioning for socially desirable ends. Without the doctrine's protection, the government would be confronted with limitless, unpredictable, and, in extreme circumstances, catastrophic liability, which could drain the very resources that are needed in the first instance to promote the public safety and welfare. Aside from damages, governmental entities would incur considerable expenses in defending the lawsuits. Most suits will survive pretrial dismissal or summary judgment motions, since the element of causation, which is almost always a question of fact, will come to replace duty as the determinative issue. In addition, a contrary rule, one whose duty element is satisfied by foreseeability alone, would invite judicial scrutiny of every action taken, as well as every action that could have been but was not taken, by the other branches of government that has some effect in the public domain.

Such a rule would subject the entire panoply of policy and enforcement decisions routinely made by the political branches to judicial oversight every time a particular injured plaintiff finds that its employees failed to properly execute their public duties or ward against harm caused by a third party. Moreover, in the absence of a special duty or relationship, it has always been considered unjust and beyond the function of tort law to impose a duty on any party to act affirmatively to protect another from being harmed by a condition or situation that the party neither created nor exacerbated. There is no legitimate reason for dispensing with this principle merely because the defendant is a governmental body. It is the sum total of these and other considerations of policy that has led the majority of courts to adopt the doctrine's essential general-duty/special-duty dichotomy. See *Shearer v. Gulf Shores* (Ala.1984), 454 So. 2d 978; *Williams v. State* (1983), 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137; *Shore v. Stonington* (1982), 187 Conn. 147, 444 A.2d 1379; *Namauu v. Honolulu* (1980), 62 Hawaii 358, 614 P.2d 943; *Ruf v. Honolulu Police Dept.* (1999), 89 Haw. 315, 972 P.2d 1081; *Ransom v. Garden City* (1987), 113 Idaho 202, 743 P.2d 70; *Kolbe v. State* (Iowa 2001), 625 N.W.2d 721; *Robertson v. Topeka* (1982), 231 Kan. 358, 644 P.2d 458; *Ashburn v. Anne Arundel Cty.* (Md.1986), 306 Md. 617, 510 A.2d 1078; *Williams v. Mayor of Baltimore* (2000), 359 Md. 101, 753 A.2d 41; *Cracraft v. St. Louis Park* (Minn.1979), 279 N.W.2d 801; *Hage v. Stade* (Minn.1981), 304 N.W.2d 283; *State ex rel. Barthelette v. Sanders* (Mo.1988), 756 S.W.2d 536; *Jungerman v. Raytown* (Mo.1996), 925 S.W.2d 202; *Phillips v. Billings* (1988), 233 Mont. 249, 758 P.2d 772; *Frye v. Clark Cty.* (1981), 97 Nev. 632, 637 P.2d 1215; *Coty v. Washoe Cty.* (1992), 108 Nev. 757, 839 P.2d 97; *Motyka v. Amsterdam* (1965), 15 N.Y.2d 134, 256 N.Y.S.2d 595, 204 N.E.2d 635; *O'Connor v. New York City* (1983), 58 N.Y.2d 184, 460 N.Y.S.2d 485, 447 N.E.2d 33; *Cuffy v.*

New York City (1987), 69 N.Y.2d 255, 513 N.Y.S.2d 372, 505 N.E.2d 937; *Stone v. North Carolina Dept. of Labor* (1998), 347 N.C. 473, 495 S.E.2d 711; *Melendez v. Philadelphia* (1983), 320 Pa.Super. 59, 466 A.2d 1060; *Catone v. Medberry* (R.I.1989), 555 A.2d 328; *Barratt v. Burlingham* (R.I. 1985), 492 A.2d 1219; *Orzechowski v. Rhode Island* (R.I.1984), 485 A.2d 545; *Bellamy v. Brown* (1991), 305 S.C. 291, 408 S.E.2d 219; *Steinke v. South Carolina Dept. of Labor, Licensing & Regulation* (1999), 336 S.C. 373, 520 S.E.2d 142; *Washington v. Lexington Cty. Jail* (App.1999), 337 S.C. 400, 523 S.E.2d 204; *Tipton v. Tabor* (S.D.1997), 1997 SD 96, 567 N.W.2d 351; *Ezell v. Cockrell* (Tenn.1995), 902 S.W.2d 394; *Vaquera v. Salas* (Tex.App.1991), 810 S.W.2d 456; *Rollins v. Petersen* (Utah 1991), 813 P.2d 1156; *Sorge v. State* (2000), 171 Vt. 171, 762 A.2d 816; *Chambers-Castanes v. King Cty.* (1983), 100 Wn. 2d 275, 669 P.2d 451; *Oberg v. Dept. of Natural Resources* (1990), 114 Wn. 2d 278, 787 P.2d 918; *Benson v. Kutsch* (1989), 181 W.Va. 1, 380 S.E.2d 36; *Holsten v. Massey* (1997), 200 W.Va. 775, 490 S.E.2d 864; *Walker v. Meadows* (1999), 206 W.Va. 78, 521 S.E.2d 801; Annotation, Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory That Only General, Not Particular, Duty Was Owed under Circumstances (1985), 38 A.L.R.4th 1194; 57 American Jurisprudence 2d (2001) 137-145, Municipal, County, School, and State Tort Liability, Sections 102-105.

[¶57] According to appellants, however, there is a growing perception that the doctrine "unjustifiably creates inequitable and harsh results for plaintiffs," which has "led an increasing number of states to abandon the public duty doctrine altogether." In support, appellants cite decisions of the high courts of the following ten states: Alaska, Arizona, Colorado, Iowa, Nebraska, New Hampshire, New Mexico,

Oregon, Wisconsin, and Wyoming. The majority also discerns that "a handful of states have rejected the public-duty rule as a bar to government liability," listing decisions from the same states with the exception of Iowa and the addition of Florida, Massachusetts, and Louisiana.

[¶58] Yet a closer analysis reveals that the public-duty doctrine has not been entirely discarded in all thirteen of these states. Just last year, the Supreme Court of Iowa clarified that it had never discarded the public-duty rule, while confirming its continued adherence to the rule on public-policy grounds. *Kolbe,* supra, 625 N.W.2d at 729-730. Thus, despite appellants' mistaken belief to the contrary, the majority correctly lists Iowa as a jurisdiction that continues to adhere to the public-duty doctrine.

[¶59] In *Brennen v. Eugene* (1979), 285 Ore. 401, 591 P.2d 719, the Supreme Court of Oregon did indeed reject the public-duty doctrine, but limited its decision to cases of active governmental misfeasance. Thus, in distinguishing a number of cases in which the public-duty doctrine was applied to governmental inaction, such as a city's failure to enforce its housing code, the court stated:

[¶60] "These cases, which deal with a failure on the part of public officials to act at all, involve considerations quite different from those in a case such as this, where an act is alleged to have been performed and performed negligently. As a general rule, one is held to a higher standard of care when he affirmatively acts than when he fails to act at all.

[¶61] "Because this case is not one of failure to act at all, we express no opinion on the scope of governmental duty in such a case." (Citation omitted.) Id. at 409, 591 P.2d 719. See, also, *Dist. of Columbia v. Forsman* (D.C.App.1990),

580 A.2d 1314, 1317, fn. 5 (noting distinction and rejecting *Brennen* "as authority for appellees' position here," where the district allegedly failed to require an adjacent property owner to obtain a demolition permit prior to commencing work that led to the collapse of plaintiffs' residence).

[¶62] In *Jean W. v. Commonwealth* (1993), 414 Mass. 496, 610 N.E.2d 305, the Supreme Judicial Court of Massachusetts rejected the public-duty rule on a four-to-three vote, largely because of the confusing way in which the doctrine had developed and been applied in Massachusetts. Nevertheless, the court decided not to abolish the doctrine at that time. Instead, the chief justice's opinion announced the court's intention to abolish the doctrine at the end of the 1993 legislative session so as to give the Massachusetts legislature an opportunity to preempt its decision by passing additional limitations on governmental liability. If not for this maneuver, the case may have been decided differently. Thus, a swing vote in that case commented as follows:

[¶63] "I join in the Chief Justice's opinion principally because the abandonment of the public duty rule is made prospective. * * *

[¶64] "From my point of view, the prospective nature of the opinion recognizes that abandonment of the public duty rule could lead to a deluge of lawsuits against governmental entities, particularly municipalities, which will drain their already limited resources. As I said in *Cyran v. Ware*, 413 Mass. 452, 455 [597 N.E.2d 1352] (1992), for example, 'society would not favor, and public policy does not support, a rule which would expose a municipality to liability for damages every time its fire department does not, in plaintiff's view, fight a fire satisfactorily. In busy urban areas such exposure could be limitless, and in extreme circumstances (as

recent events in Los Angeles illustrate), the potential cost of such governmental liability could be catastrophic.' In addition to damages, governmental entities will incur considerable costs to defend the lawsuits. Most of the suits will probably survive summary judgment (since causation, the issue which will be at the heart of most * * * actions under the new rule, is almost always a question of fact). The costs of defense thus will encompass fees and expenses for discovery, which in present lawsuits is often lengthy and costly, and fees for trial and appeals. The costs could have severe impact on public treasuries. I am not persuaded that the Legislature either intended or anticipated this result when G.L. c. 258 [the Massachusetts Tort Claims Act] was enacted." Id., 414 Mass. at 523-524, 610 N.E.2d 305 (Greaney, J., concurring.)

[¶65] In any event, the Massachusetts legislature responded to the decision in *Jean W.* by codifying many aspects of the public-duty rule, including a provision barring liability for negligent inspections by public employees. See *Gallego v. Wilson* (D.Mass.1995), 882 F. Supp. 1169, 1172; Barry, *Brum v. Town of Dartmouth* and the Public Duty Rule: Navigating an Interpretive Quagmire (2000), 41 B.C.L.Rev. 383, 410-413; Mass. Gen. Laws ch. 258, Section 10(f).

[¶66] The decisions cited by appellants and the majority in support of the rejection of the doctrine in Alaska, Arizona, Colorado, and Louisiana have all been superseded or abrogated by subsequent legislative action in those jurisdictions as well. See *Wilson v. Anchorage* (Alaska 1983), 669 P.2d 569, 571; *Clouse v. State* (2001), 199 Ariz. 196, 199, 16 P.3d 757; *Aztec Minerals Corp. v. Romer* (Colo.App.1996), 940 P.2d 1025, 1031, 25 Colo. Law. No. 12 220; *Persilver v. Louisiana Dept. of Transp.* (La.App.1991), 592 So. 2d 1344, 1347, fn. 2.

[¶67] Finally, even the most ardent and ingenious proponent of the rule's abolition would be hard-pressed to argue that it no longer exists in Florida. As noted by the majority, the Supreme Court of Florida rejected the public-duty rule in *Commercial Carrier Corp. v. Indian River Cty.* (Fla.1979), 371 So. 2d 1010, 1015-1016. Nevertheless, the court was impressed by the notion that " 'in any organized society there must be room for basic governmental policy decision and the implementation thereof, unhampered by the threat or fear of sovereign tort liability.' " Id., 371 So. 2d at 1019, quoting *Evangelical United Brethren Church v. State* (1965), 67 Wn. 2d 246, 254, 407 P.2d 440. Accordingly, the court replaced the public-duty rule with a "discretionary-function exception" to Florida's statutory waiver of sovereign immunity. Rather than utilizing the public-duty/special-duty dichotomy to determine governmental tort liability, the discretionary-function exception "distinguishes between the 'planning' and 'operational' levels of decision-making by governmental agencies." Id., 371 So. 2d at 1022.

[¶68] In a series of cases decided on April 4, 1985, the Florida Supreme Court endeavored to clarify the law of governmental tort liability, particularly with regard to the planning/operational dichotomy it created in *Commercial Carrier Corp.* See *Trianon Park Condominium Assn., Inc. v. Hialeah* (Fla.1985), 468 So. 2d 912; *Reddish v. Smith* (Fla.1985), 468 So. 2d 929; *Everton v. Willard* (Fla.1985), 468 So. 2d 936; *Carter v. Stuart* (Fla.1985), 468 So. 2d 955; *Duvall v. Cape Coral* (Fla.1985), 468 So. 2d 961; *Daytona Beach v. Huhn* (Fla.1985), 468 So. 2d 963; *Rodriguez v. Cape Coral* (Fla.1985), 468 So. 2d 963.

[¶69] As relevant here, Florida's high court clarified that although governmental entities are not immune from liability for their operational activities, neither are they automatically

subject to liability for acts or omissions that occur at the operational level of government. "In order to subject the government to tort liability for operational phase activities, there must first be either an underlying common law or statutory duty of care in the absence of sovereign immunity." *Trianon Park Condominium Assn.*, 468 So. 2d at 919.

[¶70] In determining that the city had no underlying duty of care to inspect for building code violations in *Trianon Park*, the court stated: "The enforcement of building codes and ordinances is for the purpose of protecting the health and safety of the public, not the personal or property interests of individual citizens. * * * Statutes and regulations enacted under the police power to protect the public and enhance the public safety do not create duties owed by the government to citizens as individuals without the specific legislative intent to do so." Id., 468 So. 2d at 922.

[¶71] In determining that a deputy sheriff had no underlying duty of care to arrest a drunk driver in *Everton*, the court explained:

[¶72] "We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual. * * * In such a case, a special duty to use reasonable care in the protection of the individual may arise. See, *e.g.*, *Schuster v. City of New York*, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

[¶73] "A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual

citizen and resulting tort liability, absent a special duty to the victim. This majority view was expressed by the United States Supreme Court in its early decision in *South v. Maryland*, 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1855)." Id., 468 So. 2d at 938.

[¶74] Thus, as one Florida Supreme Court justice stated, "Today the majority embraces the very analysis explicitly quashed in *Commercial Carrier*." *Trianon Park Condominium Assn.*, 468 So. 2d at 924 (Ehrlich, J., dissenting). And as observed by another, "Careful readers will recognize, absent the labeling, the substance of the [public duty] doctrine." Id., 468 So. 2d at 926 (Shaw, J., dissenting).

[¶75] It would therefore appear that the number of states willing to discard all vestiges of the public-duty rule has not increased to 12 or 13, but has actually dwindled to about 4 or 5 at the most.

[¶76] Moreover, the argument that the public-duty rule should be abandoned because of the hardship it causes to plaintiffs has "been raised before and rejected. It is true that some individuals will suffer substantial hardship as a result of their inability to recover for their injuries from a municipality that negligently fails to enforce its own regulations. The deleterious impact that such a judicial extension of liability would have on local governments, the vital functions that they serve, and ultimately on taxpayers, however, demands continued adherence to the existing rule. All the more is this so when there has been reliance for decades on this doctrine for purposes of municipal fiscal planning. If liability to individuals is to be imposed on municipalities for failure to enforce statutes or regulations intended for the general welfare, that imposition should come from the Legislature."

O'Connor v. City of New York, 58 N.Y.2d at 192, 460 N.Y.S.2d 485, 447 N.E.2d 33.

[¶77] When we first adopted the public-duty rule to determine a municipality's tort liability in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468, we had already abolished the judicially created doctrine of municipal immunity in *Enghauser Mfg. Co. v. Eriksson Eng. Ltd.* (1983), 6 Ohio St.3d 31, 6 OBR 53, 451 N.E.2d 228. We explained: "Rather than being an absolute defense, as was sovereign immunity, the public duty rule comported with the principles of negligence, and was applicable to the determination of the extent to which a statute may encompass the duty upon which negligence is premised. * * * It can therefore be concluded that the public duty rule is an independent doctrine and, consequently, survives the abrogation of sovereign immunity." *Sawicki*, 37 Ohio St.3d at 230, 525 N.E.2d 468.

[¶78] When the court applied the public-duty rule to claims against the state in *Anderson v. Ohio Dept. of Ins.* (1991), 58 Ohio St.3d 215, 569 N.E.2d 1042, and *Hurst v. Ohio Dept. of Rehab. & Corr.* (1995), 72 Ohio St.3d 325, 650 N.E.2d 104, the state had already waived its immunity from liability under R.C. 2743.02. Consistent with *Sawicki*, we naturally determined that the public-duty rule is a defense independent of sovereign immunity and, therefore, is unaffected by the waiver of state immunity. *Anderson,* 58 Ohio St.3d at 218, 569 N.E.2d 1042; *Hurst*, 72 Ohio St.3d at 329, 650 N.E.2d 104.

[¶79] According to the majority, however, *Anderson* and *Hurst* should have been decided differently from *Sawicki* because the state, in waiving its immunity under R.C. 2743.02(A)(1), consented to be sued, and have its liability

determined, "in accordance with the same rules of law applicable to suits between private parties. "Thus, while the public-duty rule may have survived the abrogation of municipal immunity, as held in *Sawicki*, a different inquiry is required to determine whether the rule survives the waiver of state immunity under R.C. 2743.02(A)(1).

[¶80] This analysis must fail, however, because it proceeds from a false premise. In order to distinguish *Anderson* and *Hurst* from *Sawicki*, it must necessarily be shown that R.C. 2743.02(A)(1)'s waiver of state immunity is distinguishable from *Enghauser's* abrogation of municipal immunity. In other words, R.C. 2743.02(A)(1) must be interpreted to impose a broader or different liability on the state than *Enghauser* imposes on municipalities. This is the majority's unstated yet essential premise, for without it there is no basis on which to avoid *Sawicki's* holding that the public-duty rule survives the abrogation of sovereign immunity.

[¶81] Yet in *Reynolds v. State* (1984), 14 Ohio St.3d 68, 70, 14 OBR 506, 471 N.E.2d 776, the very case upon which the majority relies to support the second paragraph of its syllabus, we specifically rejected this interpretation of R.C. 2743.02, stating that "the abrogation of the sovereign immunity of the state, which was accomplished by the passage of R.C. 2743.02, is not significantly different from the common-law abrogation of municipal sovereign immunity accomplished by this court [in *Enghauser*]." We then held that the language in R.C. 2743.02 that the state shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties" means essentially the same thing as *Enghauser* held with regard to the abrogation of municipal immunity. Compare *Reynolds*, at paragraph one of the syllabus, with *Enghauser*, 6 Ohio St.3d

31, 6 OBR 53, 451 N.E.2d 228, at paragraph two of the syllabus.

[¶82] There is, therefore, no substantial difference between R.C. 2743.02(A)(1)'s waiver of state immunity and *Enghauser's* abrogation of municipal immunity. To the contrary, R.C. 2743.02(A)(1) imposes the same liability on the state that *Enghauser* imposes on municipalities. Thus, in determining the viability of the public-duty rule, there is no valid basis on which to distinguish suits against the state from suits against municipalities.

[¶83] On a more basic level, there is no reciprocal relationship between R.C. 2743.02(A)(1) and the public-duty rule. Sovereign immunity is a defense that bars only the enforcement of civil liability. Conceptually, it does not deny the existence of a duty or the wrongfulness of government conduct. Instead, it functions to exempt government from the usual liability that flows from the breach of an established duty of care. The sovereign-immunity doctrine may readily admit of the existence of a tort because it applies nonetheless to disallow all liability within the limits of the immunity.

[¶84] In waiving the state's immunity from liability, R.C. 2743.02(A)(1) does nothing more than remove this exemption, thereby exposing the state to liability for those acts or omissions that would have been actionable at common law but for its immunity. The statute does not expressly abolish the public-duty rule, nor does it purport to define negligence, establish duties, or create new causes of action. It leaves these matters for judicial determination in accordance with the same common-law principles that govern the liability of private parties. R.C. 2743.02(A)(1) does not, therefore, obviate the plaintiff's burden of establishing the elements of actionable negligence.

[¶85] The liability of any defendant charged with negligence is premised on the existence and breach of a duty owed to the person claiming injury. In determining the existence of any duty, courts must inevitably consider the status of the parties involved, including their relationships to one another and society at large, and then make a social judgment as to whether and what extent the plaintiff's interests are entitled to legal protection against the defendant's conduct. The considerations of policy that inhere in this determination will necessarily vary and shift depending on the nature of the duty for which legal recognition is sought.

[¶86] In ascertaining the existence of a public duty, courts must therefore consider the relationship between government and its citizens and decide whether public policy supports a rule that would subject the government to liability every time one of its employees fails to enforce a statute or regulation intended for the general welfare. Viewed in this light, the public-duty rule is but a conclusory expression of those considerations that lead us to answer this inquiry in the negative. It is basically a function of those common-law principles that inhere in the determination of duty and, as such, lies beyond the reach of either the application or the abrogation of sovereign immunity.

[¶87] This is why the two doctrines--sovereign immunity and public duty--are considered to be independent of one another, so that the abrogation of one does not affect the viability of the other. This is also why most courts have adopted or retained the public-duty rule, as we did in *Anderson* and *Hurst*, despite the passage of statutes similar to R.C. 2743.02 in their respective jurisdictions. See, e.g., *Washington v. Lexington Cty. Jail*, 337 S.C. at 404-405, 523 S.E.2d 204; *Walker v. Meadows*, 206 W.Va. at 83, 521 S.E.2d 801; *Stone v. N. Carolina Dept. of Labor*, 347 N.C.

at 478, 495 S.E.2d 711; *Tipton v. Tabor*, 567 N.W.2d at 356-357; *Holsten v. Massey*, 200 W.Va. at 780-784, 490 S.E.2d 864; *Ezell v. Cockrell*, 902 S.W.2d at 399; *Denis Bail Bonds, Inc. v. State* (1993), 159 Vt. 481, 622 A.2d 495; *J & B Dev. Co., Inc. v. King Cty.* (1983), 100 Wn. 2d 299, 304, 669 P.2d 468; *Cracraft v. St. Louis Park*, 279 N.W.2d at 803-806; *Motyka v. Amsterdam*, 15 N.Y.2d at 138, 256 N.Y.S.2d 595, 204 N.E.2d 635; 57 American Jurisprudence 2d, supra, Municipal, County, School, and State Tort Liability, Sections 92 and 93.

[¶88] The majority argues, however, that this view of the public-duty rule as a function of duty "ignores a vital feature of the doctrine that is incompatible with R.C. 2743.02(A)(1). The applicability of the public-duty rule depends upon the public status of the particular defendant raising it as a bar to liability. In other words, only *governmental* entities and their employees may rely on the rule. It is spurious logic to conclude that a doctrine that is, by definition, available only to *public* defendants can be consistent with a statute mandating that suits be determined in accordance with rules of law applicable to *private* parties." (Emphasis sic.)

[¶89] This analysis is conceptually upside down. In passing R.C. 2743.02(A)(1), the General Assembly incorporated the common-law rules of negligence. The applicable common-law rule that is relevant here provides that actionable negligence depends upon the breach of a duty owed by the defendant to the injured plaintiff. The application of the public-duty rule is dependent upon the public status of the particular defendant who invokes it because the duty that is sought to be imposed on that defendant depends solely on the defendant's public status. It is the alleged duty, not the rule, that in the first instance brings the defendant's public status

into play. The rule simply responds to the public nature of the duty for which legal recognition is sought.

[¶90] Moreover, the rejection of the public-duty rule will actually result in the state having its liability determined in accordance with rules of law that are not applicable in suits brought against private tortfeasors. Private parties do not owe a duty of protection to those with whom they have no special relationship and for whose benefit they have not assumed to act. See, generally, 2 Restatement of the Law 2d, Torts (1965), Sections 314 et seq. Nor are private parties liable for the breach of public duties. Instead, they are benefited by the same public-duty/special-duty dichotomy that inheres in the public-duty rule. Thus, duties created by legislative enactments or administrative regulations that are intended for the protection or benefit of the public at large cannot form the basis of a negligence action even against private parties. See, e.g., *Wagner v. Anzon, Inc.* (1996), 453 Pa.Super. 619, 627, 684 A.2d 570; *Tri-State Mint, Inc. v. Riedel Env. Serv., Inc.* (C.A.8, 1994), 29 F.3d 424, 426; *Hagen v. Sioux Falls* (1990), 464 N.W.2d 396, 399; *Taylor v. Stevens Cty.* (1988), 111 Wn. 2d 159, 163, 759 P.2d 447; *Bittle v. Brunetti* (Colo.1988), 750 P.2d 49; *Nichols v. Sitko* (1987), 157 Ill. App. 3d 950, 109 Ill. Dec. 903, 510 N.E.2d 971; *Gardner v. Wood* (1987), 429 Mich. 290, 311-312, 414 N.W.2d 706; *J & B Dev. Co. v. King Cty.*, 100 Wn. 2d at 304, 669 P.2d 468; *Cracraft v. St. Louis Park*, 279 N.W.2d at 805-806; 2 Restatement of the Law 2d, Torts, supra, Section 288; 57A American Jurisprudence 2d (1989) 683-684, Damages, Section 767.

[¶91] As explained by the Supreme Court of North Carolina:

[¶92] "Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. See *Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.) (recognizing that if the State were held liable for a failure to enforce laws and regulations establishing safety standards for construction and use of buildings, the State's *status* as a governmental entity 'would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws for the protection of the public'), *cert. denied*, 444 U.S. 835 [100 S. Ct. 69], 62 L. Ed. 2d 46 (1979). If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*. The public duty doctrine, by barring negligence actions against a governmental entity absent a 'special relationship' or a 'special duty' to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person could be liable." (Emphasis sic.) *Stone v. North Carolina Dept. of Labor*, 347 N.C. at 478-479, 495 S.E.2d 711.

[¶93] Thus, as succinctly stated by the Supreme Court of Iowa, the public-duty rule is " 'consistent with the principle that public employees share the same--but not greater--liability to injured parties as other defendants under like circumstances.'" *Kolbe v. State*, 625 N.W.2d at 729, quoting *Sankey v. Richenberger* (Iowa 1990), 456 N.W.2d 206, 209.

[¶94] The majority insists that "cases from this court, however, suggest otherwise. We have expressly stated that a duty, for purposes of a negligence claim, may arise out of a legislative enactment. *Chambers* [*v. St. Mary's School* (1998)], 82 Ohio St.3d [563] at 565, 697 N.E.2d 198; see, also, *Gelbman v. Second Natl. Bank of Warren* (1984), 9

Ohio St.3d 77, 79, 9 OBR 280, 458 N.E.2d 1262. And this court has cited statutory law as a means of addressing whether the duty element was satisfied in negligence suits against private parties. See, e.g., *Mussivand* [*v. David* (1989)], 45 Ohio St.3d [314] at 320, 544 N.E.2d 265; *Shroades v. Rental Homes* (1981), 68 Ohio St.2d 20, 22 O.O.3d 152, 427 N.E.2d 774. Thus, as a general matter, government actors are not alone in having duties imposed upon them by statute."

[¶95] But in the absence of the public-duty rule, government actors would be alone in having public or general protective duties imposed upon them by statute, and the cases on which the majority relies do not suggest otherwise. In none of these cases has this court indicated that public duties created by statute can form the basis of a negligence action against private parties. Nor do any of these cases cite statutory law as a means of imposing a general duty on private parties to act affirmatively for another's protection.

[¶96] In *Mussivand*, we held that "[a] person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at a minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition." Id., 45 Ohio St.3d 314, 544 N.E.2d 265, at paragraph one of the syllabus. In so holding, we cited R.C. 3701.81(A) as statutory support for this duty. Id., 45 Ohio St.3d at 319, 544 N.E.2d 265. R.C. 3701.81(A) provides, "No person, knowing or having reasonable cause to believe that he is suffering from a dangerous, contagious disease, shall knowingly fail to take reasonable measures to prevent exposing himself to other persons, except when seeking medical aid."

[¶97] It is immediately apparent that both R.C. 3701.81(A) and the holding in *Mussivand* require an

individual to control only his or her own conduct so as not to harm another. They do not, however, establish any sort of general duty under which a private party is obligated to control or protect against the conduct or condition of a third person. This kind of duty could not be imposed on a private actor in the absence of a special relationship as provided in Restatement of Torts Sections 314 and 315.

[¶98] In *Gelbman*, the court *declined* to impose an affirmative duty on a private property owner to protect third parties from the negligent acts of business invitees that occur outside the owner's property and are beyond the owner's control. In so doing, we explained that "liability in negligence will not lie in the absence of a special duty owed by the defendant" and that "unless a special relationship between defendant-owner and plaintiff-third party is extant by statute or judicial determination, no duty may be imposed." Id., 9 Ohio St.3d at 78, 79, 9 OBR 280, 458 N.E.2d 1262. See, also, *Eichorn v. Lustig's, Inc.* (1954), 161 Ohio St. 11, 52 O.O. 467, 117 N.E.2d 436, syllabus (private property owner has no common-law duty to protect others from defective conditions that exist outside the owner's property "unless such defects are created or negligently maintained or permitted to exist by such owner for his own private use or benefit").

[¶99] In *Chambers*, the court held that the violation of an administrative rule, such as the Ohio Basic Building Code, does not constitute negligence per se. In so holding, the court distinguished administrative rules from legislative enactments, the violation of which was held to constitute negligence per se in *Eisenhuth v. Moneyhon* (1954), 161 Ohio St. 367, 53 O.O. 274, 119 N.E.2d 440. 82 Ohio St.3d at 566-567, 697 N.E.2d 198. In *Eisenhuth*, the court explained: "The violation of any specific legislative enactment enacted for the protection of private persons is of itself such a breach of duty as to

constitute negligence. * * * However, a legislative enactment which does not purport to define a civil liability *but merely makes provision to secure the safety or welfare of the public* is not to be construed as establishing such a liability." (Emphasis added.) Id., 161 Ohio St. at 372-373, 53 O.O. 274, 119 N.E.2d 440.

[¶100] In *Chambers*, the court stated, "Typically, a duty may be established by common law, legislative enactment, or by the particular facts and circumstances of the case." 82 Ohio St.3d at 565, 697 N.E.2d 198. Given that *Chambers* did not even deal with a statute, it can hardly be asserted that this rather innocuous observation suggests that statutory duties imposed for the protection of the general public can form the basis of a negligence claim against a private party.

[¶101] In *Shroades*, we held that "[a] landlord is liable for injuries, sustained on the demised residential premises, which are proximately caused by the landlord's failure to fulfill the duties imposed by R.C. 5321.04." Id., 68 Ohio St.2d 20, 22 O.O.3d 152, 427 N.E.2d 774, at the syllabus. However, the duties imposed by R.C. 5321.04 are not intended for the protection and benefit of the general public but are intended "to protect persons using rented residential premises from injuries." Id., 68 Ohio St.2d at 25, 22 O.O.3d 152, 427 N.E.2d 774.

[¶102] In fact, when this court modified *Shroades* in *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, 497, 727 N.E.2d 1277, we relied on Sections 288A and 288B of the Restatement of Torts in determining when a landlord will be excused from liability for violating the duties imposed by R.C. 5321.04. Sections 288A and 288B come into play, however, only after a determination is made whether the standard of conduct defined by a particular statute should be

adopted under Section 286 as the standard of conduct for tort liability or rejected under Section 288. Pursuant to Section 288, courts will not adopt the requirements of legislative enactments that are "intended only for the protection of the interests of the community as such, or of the public at large, rather than for the protection of any individual or class of persons." 2 Restatement of Torts at 30, Comment *b*. Nor will they rely on statutes that are enacted "only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm." Id. at 31, Comment *c*.

[¶103] Moreover, since we are now comparing duties imposed on public and private parties, it is worthwhile to point out that the public-duty rule does not apply to prevent the imposition of similar statutory duties on the state in its capacity as landowner. See, e.g., *Oberg v. Dept. of Natural Resources* (1990), 114 Wn. 2d 278, 787 P.2d 918.

[¶104] In finding the public-duty rule to be inconsistent with R.C. 2743.02(A)(1) merely because private parties have duties imposed upon them by statute, the majority has therefore engaged an apples-oranges comparison. The nature of the duties that can be legitimately imposed upon private parties by statute for purposes of negligence under the foregoing decisions are inherently different from those statutorily created duties that the majority's decision now imposes upon public parties. There is a qualitative difference between imposing statutory duties on private parties to control their own activities and imposing statutory duties on public employees to control the activities of others. It must not be forgotten that today's decision imposes potential liability on the fire marshal for failure to act affirmatively so as to ascertain and correct a defect on private land that he did not

create, for the aid and protection of third parties with whom he had no special relationship, and purportedly derives from an internal rule adopted pursuant to the discretionary portion of a statute that was enacted for the safety and welfare of the general public. This is a far cry from imposing statutory duties on a landlord to remedy known defects on his own premises for the safety of those who are invited to use his property.

[¶105] In the second part of its opinion, the majority attempts to assuage any fear on the part of government that the abolition of the public-duty rule will engender excessive state liability. According to the majority, "there are already important safeguards in Court of Claims jurisprudence that satisfy the public-policy concerns addressed by the public-duty rule." The majority also advises that "conventional negligence principles already provide some measure of protection * * * to the actions of a state tortfeasor," while pointing to some of the same principles that justify the public-duty rule in the first instance. Based on these safeguards and principles, the majority concludes that "the public-policy rationales that supported our adoption of the public-duty rule in *Sawicki* do not carry the same force when analyzing whether the doctrine should apply to suits against the state in the Court of Claims."

[¶106] However, the majority never concludes that the public-duty rule is unjust, or finds that its underlying policy considerations are invalid, or otherwise explains why it is preferable to rely on other safeguards and protections against excessive government liability that go only part way in addressing the legitimate concerns of the public-duty rule. Moreover, every safeguard and common-law rule cited by the majority, including that provided by *Reynolds*, is equally applicable in claims against municipalities. Thus, the policy

considerations that supported our adoption of the public-duty rule in *Sawicki* carry precisely the same force in determining whether the doctrine should apply to suits against the state.

[¶107] For all of the foregoing reasons, I would affirm the judgment of the court of appeals, which denied liability in this case upon the application of the public-duty rule.

LUNDBERG STRATTON, J., dissenting.

[¶108] I do not believe that the language in R.C. 2743.02 that requires that the state shall "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties" conflicts with the public-duty rule. I would continue to adhere to the public-duty rule pursuant to *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222, 525 N.E.2d 468, and its progeny. Therefore, I respectfully dissent.

[¶109] The majority reasons that the language in R.C. 2743.02 that states that a lawsuit against the state must be determined in accordance with the "same rules of law applicable to suits between private parties" conflicts with the public-duty rule because the public-duty rule is a defense that applies only to the government. Thus, the majority interprets the phrase "same rules of law" to mean that a statute cannot affect the state differently than it would affect private parties. I believe that the majority misconstrues the language of R.C. 2743.02.

[¶110] The majority in the second paragraph of its syllabus excludes judicial and legislative functions from the waiver of immunity, but I simply cannot follow its logic as to why these areas fall outside the language of "suits between private parties," while a *public* duty is somehow included.

The reasoning is so internally inconsistent that I find it difficult to even argue against.

[¶111] The General Assembly waived the state's immunity from liability when it enacted R.C. 2743.02. However, R.C. 2743.02 does not create "new rights or causes of action." *Reese v. Ohio State Univ. Hosp.* (1983), 6 Ohio St.3d 162, 163, 6 OBR 221, 451 N.E.2d 1196. "It only provides a remedy for existing duties where the state was previously immune from suit and a *private party under similar circumstances would have been liable.*" (Emphasis added.) *Shelton v. Indus. Comm.* (1976), 51 Ohio App.2d 125, 130, 5 O.O.3d 286, 367 N.E.2d 51.

[¶112] In *Shelton,* the court addressed whether the language in R.C. 2743.02(A)(1), that made the state liable in accordance with the same rules of law applicable between private parties, permitted an injured worker to sue the Industrial Commission for failure to enforce safety standards. 51 Ohio App.2d 125, 5 O.O.3d 286, 367 N.E.2d 51. The court held that because there was no statutory duty among private parties to inspect and enforce safety standards, the injured worker could not sue the Industrial Commission because such an action did not exist between private parties before the waiver of immunity.

[¶113] The majority states that the *Shelton* "reasoning operates on the unstated premise that statutes creating duties for governmental actors cannot satisfy the duty element for purposes of the state's liability for negligence because there are no statutory duties that may similarly bind private parties." The majority then dismisses the *Shelton* reasoning, recognizing that "government actors are not alone in having duties imposed on them by statute."

[¶114] The language waiving sovereign immunity "should be construed reasonably to at least make sure that before the public treasury is emptied the result was intended by the legislature." *Oregon v. Ferguson* (1978), 57 Ohio App.2d 95, 102, 11 O.O.3d 94, 385 N.E.2d 1084. The majority's analysis fails to recognize that *some* statutes that are enacted for the welfare of the public generally can be imposed only on the state. *Shelton*, 51 Ohio App.2d at 131, 5 O.O.3d 286, 367 N.E.2d 51, see, also, *Stone v. North Carolina Dept. of Labor* (1998), 347 N.C. 473, 495 S.E.2d 711. Therefore, statutes that impose these public duties are not applicable in suits between private parties. *Oregon*, 57 Ohio App.2d at 101-102, 11 O.O.3d 94, 385 N.E.2d 1084; *Stone*, 347 N.C. at 478, 495 S.E.2d 711. Because these public-duty statutes impose duties only upon the government and not on private parties, they may not be the basis for an action against the state because they are not "in accordance with the same rules of law applicable to suits between private parties."

[¶115] The public-duty rule is a defense that applies only where a lawsuit against the state is based upon a law that imposes a public duty *on the state*. See *Hurst v. Ohio Dept. of Rehab. & Corr.* (1995), 72 Ohio St.3d 325, 650 N.E.2d 104; cf. *Brodie v. Summit Cty. Children Serv. Bd.* (1990), 51 Ohio St.3d 112, 119, 554 N.E.2d 1301 (child-abuse statute imposes specific duty on state to each allegedly abused child; thus, the public-duty rule is not applicable). Therefore, the requirement in R.C. 2743.02 that the state's liability be determined according to the same rules of law that apply to suits between private parties does not conflict with the public-duty rule.

[¶116] Further, I believe that the majority's holding could have unintended consequences. R.C. 2743.02 also requires

courts to apply the same rules of procedure that apply between private parties. *Reese,* 6 Ohio St.3d at 164, 6 OBR 221, 451 N.E.2d 1196. Civ.R. 62, which applies to lawsuits between private parties, treats the state differently from private persons when seeking a stay upon an appeal. Under Civ.R. 62, the state is provided an automatic stay without the requirement of bond, while a private person must post bond. *State ex rel. State Fire Marshal v. Curl* (2000), 87 Ohio St.3d 568, 722 N.E.2d 73. According to the majority's reasoning, Civ.R. 62(C), which permits a stay in favor of the state without bond, would no longer be applicable because it treats the state differently from other private parties. I do not believe that the General Assembly intended the nullification of rules or statutes solely because they treat the state differently.

[¶117] Finally, the Tenth District Court of Appeals, first in *Shelton* and later in *Ferguson,* invited the General Assembly to correct the court's interpretation that the state could not be sued pursuant to statutes where the duty was owed only to the public generally if it disagreed with these judgments. *Shelton,* 51 Ohio App.2d at 131, 5 O.O.3d 286, 367 N.E.2d 51; *Ferguson,* 57 Ohio App.2d at 102, 11 O.O.3d 94, 385 N.E.2d 1084, 1088. Despite this invitation, the General Assembly has taken no such action.

[¶118] Because I strongly believe that the majority's interpretation is clearly not what the General Assembly intended, I invite the *General Assembly* to clarify whether *they* intended the phrase, "suits between private parties," to abrogate the public-duty rule.

[¶119] Therefore, I would affirm the judgment of the court of appeals. Accordingly, I respectfully dissent.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing dissenting opinion.

APPENDIX D

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Case No. 99AP-1303

[Filed October 19, 2000]

John Wallace, Individually and as Administrator of the Estate of Jason O. Wallace et al., Plaintiffs-Appellants,	)
v.	)
Ohio Department of Commerce, Division of State Fire Marshal, Defendant-Appellee.	)

JUDGMENT ENTRY

For the reasons dated in the opinion of this court rendered herein on October 19, 2000, plaintiffs' first and second assignments of error are overruled, plaintiffs' third and fourth assignments of error are rendered moot, and the judgment of the Ohio Court of Claims is hereby affirmed.

/s/
Judge Dana A. Deshler

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Case No. 99AP-1303

[Filed October 19, 2000]

John Wallace, Individually and as Administrator of the Estate of Jason O. Wallace et al., Plaintiffs-Appellants,	)
v.	)
Ohio Department of Commerce, Division of State Fire Marshal, Defendant-Appellee.	)

OPINION

APPEAL from the Ohio Court of Claims.

DESHLER, J.

This is an appeal by plaintiffs from a judgment of the Ohio Court of Claims rendered in favor of defendant, Ohio Department of Commerce, Division of State Fire Marshal, on plaintiffs' negligence action.

On December 29, 1999, plaintiffs, John Wallace, Willa D. Wallace, Nancy G. Tolliver, Willie Workman, Zilla Joan Sansom, Clyde R. Sansom, Linda Carmon, Charles Cooper, Gregory Lee, Paul Wilks, Marcia S. Garrett, Richard Pruitt, Rhonda Ferguson and Amy Pruitt, filed a complaint in the

Court of Claims against defendant. Plaintiffs' complaint alleged that, on July 3, 1996, plaintiffs and/or their decedents were patrons and invitees on the premises of a fireworks store located at State Route 217, Scottown, Ohio, operated by Flying Dragon, Inc., d.b.a. The Ohio River Fireworks Company. The complaint alleged that, on that date, a fire was "allowed to start in fireworks that were openly displayed" in the store. Plaintiffs alleged that, pursuant to R.C. 3737.22 and 3743.01 *et. seq.*, defendant had certain powers, duties, obligations and responsibilities with respect to manufacturers, suppliers, wholesalers and retailers of fireworks. Plaintiffs further alleged that defendant negligently and carelessly failed to exercise reasonable and ordinary care with respect to those powers, duties, obligations and responsibilities, resulting in death or injury to plaintiffs or their decedents.

By entry filed September 2, 1998, the trial court bifurcated the issues of liability and damages for trial. The matter came for trial before the Court of Claims beginning on March 15, 1999.

The following facts are drawn primarily from the trial court's decision, which comprehensively sets forth the factual background of the case and the basis of the court's decision. At the time of the incident, Flying Dragon, Inc., was licensed as a wholesaler of fireworks pursuant to R.C. 3743.16. The wholesaler license is the only type of fireworks sales license issued by the state and, during the time period at issue, such license permitted its holder to sell both "Class C" and "Class B" fireworks. Class C fireworks are common "backyard fireworks," intended for use by the general public, while Class B fireworks contain greater amounts of explosive material and can only be sold to licensed exhibitors for use at public fireworks exhibitions.

The Ohio River Fireworks Company was located on a hill in a rural area of Lawrence County. The store consisted of a thirty-two by forty-foot concrete block building, with a concrete floor and a metal roof supported by wooden rafters. The main entrance door and two windows were located on the front wall, while a second door was located at the rear of the store. The interior walls contained wooden storage shelves, while three additional rows of metal shelves created four aisles within the store. The main showroom building was used for the sale of Class C fireworks to the general public, and additional storage for Class C fireworks was provided by six trailers parked along the east side of the store. Class B fireworks were stored in a separate building located southwest of the main building.

The main building had a "full suppression" overhead sprinkler system that received water from an elevated pond located on a hill behind the store. A valve located inside the store on the back wall manually controlled water flow to the sprinkler system. A pressure gauge in the northwest corner of the building displayed the static water pressure in the sprinkler system. The trial court found that "the sprinkler system's control valve had been turned off some time prior to the fire, rendering it inoperable."

On the date of the incident, Richard Pruitt, a store employee, observed Todd Hall and three other individuals walk through the entrance gate and approach the store. When Hall walked into the store, another employee working at an outside cash register shouted to Pruitt that this individual was carrying a lit cigarette. Pruitt followed Hall into the store and observed Hall standing next to a stack of "crackling wheel" fireworks that were displayed on a shelf near the northwest corner of the building. Pruitt then observed Hall use the cigarette to light the fuse of a firework, causing the firework

to immediately begin emitting sparks. Pruitt shouted at Hall to stop, and Pruitt attempted to extinguish the exploding fireworks by "stomping" on them. During this time, Hall exited through the rear door of the store. When Pruitt realized that the fire was out of control, he warned the occupants to leave the building, and Pruitt fled the building through the front door exit.

After exiting the building, Pruitt pursued and caught up with Hall; at that time, Pruitt observed that Hall was both physically and mentally impaired. Pruitt enlisted the help of other individuals to detain Hall until the police arrived. Hall's three companions were also detained. When Pruitt returned to the store, the building was engulfed in smoke and flames. Nine people died and eleven others were injured from the fire.

At trial, the court heard expert testimony regarding the effectiveness of a functional sprinkler system in reducing smoke and fumes, and increasing survivability in a fireworks fire. Plaintiffs' fire protection expert, David Demers, concluded that the system installed at the store was capable of functioning if the water supply had not been shut off. Demers opined that the heat from the fire would have caused the first sprinkler head to have opened within thirty seconds after the fireworks were ignited, and that the sprinkler's discharge would have been sufficient to limit the fire and resulting toxic gases.

Defendant's expert, Dr. John Hoffman, determined that a conservative estimate for the atmospheric level of carbon monoxide gas in the store after a thirty-second burn period was eight percent, or 80,000 parts per million ("ppm"). Even at levels below that number, carbon monoxide enters the blood stream and combines with normal hemoglobin to

produce "carboxyhemoglobin," a compound that prevents the absorption of oxygen. The lack of oxygen to body tissues and organs results in mental disorientation and then physical incapacitation. The trial court noted that, "although it is difficult to accurately determine the level of CO that existed in the store in the moments following the onset of the blaze, the expert testimony presented at trial by both parties described an environment that would quickly cause incapacitation." In this regard, plaintiffs' toxicology expert, Dr. Yves Alarie, testified that, in an atmosphere of 20,000 ppm of carbon monoxide, survivability would be limited to approximately four and one-half minutes. Defendant's pathology expert, Dr. George Nichols, opined that at a carbon monoxide level of 80,000 ppm, incapacitation would occur after only two or three breaths.

The trial court noted that other highly toxic gases emitted by the burning fireworks, such as hydrogen cyanide and formaldehyde, also would have affected survivability. The court found that, given the lethal environment that developed within thirty seconds after the fireworks ignited, "even a fully functioning sprinkler system would not have completely prevented plaintiffs' injuries." However, the court also found that "defendant's argument that an operational sprinkler system would have made little or no difference in the outcome is implausible."

The facts set forth by the trial court also indicated that, between 1991 and the date of the incident, defendant's employees conducted at least twelve inspections of the Ohio River Fireworks Company, "including both the statutorily required annual inspections and additional seasonal inspections during the peak fireworks season which is May to July Fourth." The findings of each annual and seasonal inspection were recorded on a "fire safety inspection

occupancy report form 903," which specifically listed the results of an examination of the sprinkler system. Each inspection report submitted as evidence indicated that there had been a satisfactory sprinkler test. The court noted, however, that "a memorandum report written on July 11, 1994, states that Fire Safety Inspector Thomas Baker conducted a non-scheduled walk-through inspection of the store and discovered that the water control valve was closed and that the sprinkler system was shut down."

James Saddler, a certified fire safety inspector, conducted the last annual re-licensing inspection for defendant of the fireworks store on October 12, 1995. Saddler testified that the store was required to have an automatic sprinkler system, and that he checked the sprinkler and its connected "water gong" alarm during each of his inspections. The October 12, 1995 annual report noted a satisfactory sprinkler test, and Saddler recommended approval of the store's license renewal.

On May 24, 1996, Daniel Lehman, an employee with the state Fire Marshal's office, issued a memorandum directing defendant's inspectors to conduct at least one "seasonal" inspection of all licensed fireworks facilities during the time period of May 24, 1996, to July 4, 1996. The seasonal inspection was to be conducted in addition to the annual licensing inspection provided under R.C. 3743.16 and 3743.17. The trial court found, however, that defendant's agents did not complete a seasonal inspection of the Ohio River Fireworks Company in 1996 because Lehman made a decision to postpone the inspection until investigators conducted an investigatory "bust-buy" operation. Lehman authorized the bust-buy operation because of a complaint received by the Fire Marshal's office on or about June 7, 1996, from a competitor of the Ohio River Fireworks Company, alleging that the store's employees were selling

Class B fireworks without verifying that purchasers had exhibitor's licenses.

The bust-buy was conducted on June 28, 1996 by two Fire Safety Inspectors, Thomas Baker and Michael Kraft, and an arson investigator, Donald Eifler. After obtaining a search warrant and a body wire from local law enforcement officials, Eifler approached the store wearing the body wire, while Kraft and Baker remained in the their car monitoring Eifler's conversation with store employees. Eifler purchased one hundred dollars worth of Class B fireworks without being asked to produce an exhibitor's license. After Eifler made the purchase, Kraft entered the main store building to retrieve the money used in the bust-buy. The court noted that, "although there was conflicting testimony at trial regarding the amount of time Eifler and Baker remained in the store, it is clear that their objective was to complete the bust-buy operation and that they did not perform a safety inspection on June 28, 1996."

At trial, the parties presented arguments regarding whether the public duty doctrine was applicable to the case. Plaintiffs assert that the public duty doctrine should not be applied because the fire marshal did not act pursuant to a statutory duty and because a special duty is owed to employees and customers of a firework's store. The trial court disagreed with plaintiffs' contention that defendant acted beyond its statutory public duty, and concluded that defendant did not assume an affirmative duty by performing seasonal inspections. The court also rejected plaintiffs' assertion that the "bust-buy" operation conducted on May 26, 1996, constituted a safety inspection, finding instead that the implementation of the bust-buy was directed toward the limited goal of purchasing Class B fireworks. The court concluded that "defendant's employees were acting in a law

enforcement capacity at the time of the bust-buy, and no special relationship existed between plaintiffs and defendant as a result of that operation."

The trial court further found that, even if defendant's agents were negligent in implementing the discretionary decision to forego a seasonal inspection and implement the bust-buy operation, "defendant's duty relating to the bust-buy is one owed to the general public, not individuals, and therefore defendant did not breach a duty to plaintiffs." The court thus held that "plaintiffs have failed to demonstrate an individual duty, as opposed to a public duty."

Alternatively, the trial court found that the "sole proximate cause of plaintiffs' injuries was Hall's act of arson." Accordingly, the court concluded that, under the totality of the circumstances, the criminal act of a third party was not a foreseeable event for which defendant could be found liable under a negligence theory.

On appeal, plaintiffs set forth the following four assignments of error for review:

First Assignment of Error:

THE TRIAL COURT ERRRED TO THE PREJUDICE OF PLAINTIFFS BY FINDING, CONTRARY TO THE ADMISSION OF THE STATE FIRE MARSHAL IN AN OFFICIAL CITATION, THAT AN INSPECTION WAS NOT PERFORMED ON JUNE 28, 1996.

Second Assignment of Error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS IN FINDING THAT THE PUBLIC DUTY DOCTRINE APPLIES TO THIS CASE.

Third Assignment of Error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS IN FINDING THAT THE CONDUCT OF A THIRD PARTY WAS AN INTERVENING ACT THAT WAS THE SOLE CAUSE OF THE FIRE IN QUESTION AND THAT THIS ACT WAS NOT FORESEEABLE.

Fourth Assignment of Error:

THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFFS BY RELYING ON THE TESTIMONY OF DEFENDANT'S EXPERT, DR. GEORGE NICHOLS, WHO BASED HIS OPINION OF THE PHYSIOLOGICAL EFFECTS OF THE FIRE SOLELY UPON THE INADMISSIBLE PRIOR OPINION OF DEFENDANT'S EXPERT, DR. JOHN HOFFMAN.

Plaintiffs' first and second assignments of error are interrelated and will be considered together. In general, plaintiffs contend that this case concerns the negligent inspection by defendant of the fireworks store on June 28, 1996, and that the trial court erred in finding that an inspection was not conducted on that date. Plaintiffs further assert that the trial court erred in finding that the public duty doctrine was applicable to the facts of this case. Plaintiffs also argue that, assuming the public duty doctrine prevents relief in this case, there is good reason to abandon its application to all cases except for police emergencies.

The primary issue presented is whether the trial court erred in finding that the public duty doctrine protected defendant from liability. At the outset, we note that Ohio law recognizes this common law rule. See *Sawicki v. Ottawa Hills* (1988), 37 Ohio St. 3d 222, 525 N.E.2d 468, paragraph three of the syllabus ("The public duty rule, and the special duty exception, comprise a doctrine which is independent of, and accordingly survived the abrogation of, sovereign immunity"). Generally, "the public duty doctrine provides that a state cannot be held liable to an individual for breach of a duty owed to the general public: 'When a duty which the law imposes upon a public official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, is generally a public and not an individual injury.'" *Burgess v. Doe* (1996), 116 Ohio App. 3d 61, 66, 686 N.E.2d 1141, quoting *Sawicki, supra*, at paragraph two of the syllabus. The public duty doctrine "is used to determine the first element of negligence, the existence of a duty on the part of the state." *Bonds v. Ohio Dept. of Rehab. & Corr.* (1996), 116 Ohio App. 3d 144, 157, 687 N.E.2d 300.

The public duty doctrine, however, is not an absolute defense, "as it must be considered with the principles of public duty, special relationship, and negligence." *Burgess, supra,* at 66. In *Sawicki, supra,* at paragraph four of the syllabus, the Ohio Supreme Court held that the following elements must be demonstrated in order to show the existence of a special duty or relationship:

> *** (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured

party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

R.C. Chapter 3743 sets forth Ohio's licensing procedures for wholesalers of fireworks, including provisions for inspections. R.C. 3743.15(A) states that "any person who wishes to be a wholesaler of fireworks in this state shall submit to the fire marshal an application for licensure as a wholesaler of fireworks before the first day of October of each year." R.C. 3743.16(A) provides in part that, if a person "submits an application for licensure as a wholesaler of fireworks *** the fire marshal shall review the application and accompanying matter *** inspect the premises on which the fireworks would be sold, and determine whether the applicant will be issued the license."

R.C. 3743.17 provides in pertinent part:

> (A) The license of a wholesaler of fireworks is effective for one year beginning on the first day of December. The fire marshal shall issue or renew a license only on that date and at no other time. If a wholesaler of fireworks wishes to continue engaging in the wholesale sale of fireworks at the particular location after its then effective license expires, it shall apply not later than the first day of October for a new license pursuant to section 3743.15 of the Revised Code. ***

R.C. 3743.21 authorizes the fire marshal to inspect the premises of a wholesaler to ensure compliance with R.C. Chapter 3743, stating as follows:

> (A) The fire marshal may inspect the premises, and the inventory, wholesale sale, and retail sales records,

of a licensed wholesaler of fireworks during the wholesaler's period of licensure to determine whether the wholesaler is in compliance with Chapter 3743. of the Revised Code and the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code.

(B) If the fire marshal determines during an inspection conducted pursuant to division (A) of this section that a wholesaler is not in compliance with Chapter 3743. of the Revised Code or the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code, the fire marshal may take one or more of the following actions, whichever the fire marshal considers appropriate under the circumstances:

(1) Order, in writing, the wholesaler to eliminate, correct, or otherwise remedy the nonconformities within a specified period of time;

(2) Order, in writing, the wholesaler to immediately cease its operations, if a fire or explosion hazard exists that reasonably can be regarded as posing an imminent danger of death or serious physical harm to persons. The order shall be effective until the nonconformities are eliminated, corrected, or otherwise remedied or for a period of seventy-two hours from the time of issuance, whichever first occurs. ***

(3) Revoke, or deny renewal of, the license of the wholesaler in accordance with Chapter 119. of the Revised Code;

(4) Take action as authorized by section 3743.68 of the Revised Code. ***

As noted, plaintiffs contend that this case concerns the negligent inspection by the defendant of the fireworks store on June 28, 1996. More specifically, plaintiffs assert that, although defendant had a statutory duty to conduct an annual inspection of the wholesaler's premises pertaining to license renewal, defendant had no statutory duty to perform "seasonal" inspections during the fireworks season. Plaintiffs argue that defendant voluntarily assumed a duty by instigating an inspection on June 28, 1996 during the "bust-buy," and that defendant's agents conducted the inspection in a negligent manner, thereby giving rise to tort liability outside the public duty doctrine.

In general, Ohio courts, including this court, have held that there is no liability for the nonperformance of an inspection or for the negligent performance of an inspection done pursuant to a statutory duty. In *Shelton v. Indus. Comm.* (1976), 51 Ohio App. 2d 125, 126, 367 N.E.2d 51, a plaintiff was seriously injured during the course of his employment when a boiler exploded. Plaintiffs filed a complaint in the Court of Claims against the state, alleging that certain state agencies were "negligent in the performance of their statutory duties to make various inspections and investigations." In *Shelton*, 51 Ohio App. 2d at 130-131, this court affirmed the judgment of the Court of Claims finding no liability on the part of the state, holding in part:

*** The Court of Claims Act does not create *new* duties, it only provides a remedy for existing duties where the state was previously immune from suit and a private party under similar circumstances would have been liable.

> *** [O]ne could say that a private party's duty to inspect and to enforce safety standards is not created by statute, but only by virtue of some other legal relationship and, hence, there is no rule of law making a private party liable for a failure to perform statutory duties of inspection and enforcement of safety standards which were enacted to protect the health, safety and welfare of all of the citizens of Ohio.
>
> *** Statutes requiring state agencies to inspect and enforce safety standards were enacted to protect the public generally against unsafe conditions. They were not intended, nor should they be so construed, to create a duty toward any particular person. Likewise, their performance or nonperformance cannot be the basis of a tort action by an injured person.

See, also, *Delman v. Cleveland Heights* (1989), 41 Ohio St. 3d 1, 4, 534 N.E.2d 835 (municipality, in conducting inspections of real estate for violations of city code pursuant to a point-of-sale inspection [*20] ordinance, did not owe a duty of care to purchaser or seller; court noted that "an apparent majority of courts which have reached the issue refuse to impose upon a municipality a duty of care to private individuals for building inspections.")

In *Mercer v. United States* (S.D. Ohio 1978), 460 F. Supp. 329, a federal court construed the provisions of the Federal Tort Claims Act in a wrongful death action brought against the government for negligent inspection of an Ohio mine. Under the facts of *Mercer*, the plaintiff alleged that agents of the government negligently performed mine inspections by failing to disclose that defendant failed to order the correction of certain violations of safety standards, proximately resulting in the death of plaintiff's decedent. In

Mercer, the court noted that "no liability has been imposed by Ohio law for the failure to perform a duty of inspection imposed by statute alone." *Id.* at 331, citing *Shelton, supra*. The court in *Mercer,* 460 F. Supp. at 331-332, further held that:

> *** [T]he Court does not believe that liability attaches when, as here, the government is neither contractually obligated to perform an inspection nor otherwise is in possession or control of the subject of the inspection, but is conducting an inspection in accordance with a statute which seeks to cause mine operators to comply with safety standards ***.
>
> ***
>
> *** The Secretary of the Interior is directed by *** statute to promulgate standards "and the operators of mines to which such standards are applicable shall comply with such mandatory standards." *** The Secretary is authorized to make such inspections "as he shall deem necessary" for determining whether the mine operators are in compliance with these standards. *** Upon discovering a violation, the inspector may issue an order requiring the mine operator to withdraw all persons from the dangerous area. A federal inspector assumes no responsibility to maintain compliance with safety standards upon which either the mine operators or their employees can rely. The responsibility remains with the operator and is not shifted to the inspector by the act of undertaking an inspection. [Citations omitted.]

In the present case, the trial court rejected plaintiffs' contention that defendant's agents were not acting pursuant to

statutory authority when it entered the store on June 28, 1996. Specifically, the court held that:

> *** [P]ursuant to R.C. 3743.21(A), the fire marshal has the express authority to conduct an inspection of the fireworks facility's premises, including its inventory and records, to determine whether the store was in compliance with applicable statutes and rules adopted by the fire marshal. The court further finds that the language of R.C. 3743.21(A) does not limit the fire marshal's authority to conduct only annual inspections. Rather, it provides that that he 'may inspect' at any time 'during the wholesaler's period of licensure to determine whether the wholesaler is in compliance.' Accordingly, the court finds that defendant did not act beyond its statutory public duty and, therefore, did not assume an affirmative duty by performing seasonal inspections.

Upon review, we agree with the trial court's finding that defendant did not act beyond its statutory authority when defendant's agents conducted the bust-buy investigation on June 28, 1996. Although R.C. sections 3743.15, 3743.16 and 3743.17 provide in general that the license of a wholesaler is effective for one year, and that renewal of a license requires submission of a new application, including an inspection requirement, R.C. Chapter 3743 does not limit authorization for inspections to one per year. Rather, as noted by the trial court, pursuant to R.C. 3743.21, the fire marshal is authorized to inspect the premises of a licensed wholesaler "during the wholesaler's period of licensure to determine whether the wholesaler is in compliance with Chapter 3743. of the Revised Code." Accordingly, defendant and its agents possessed statutory authority to enter the premises to determine whether the wholesaler was in compliance with

statutory prohibitions against the sale of Class B fireworks to persons other than licensed exhibitors. We further note that we agree with the trial court's conclusion that the evidence indicates that the purpose of the bust-buy was not a safety inspection to discover fire hazards; however, even assuming that a safety inspection took place, such inspection would not have fallen outside the statutory authority of defendant. Thus, because defendant was acting within its statutory authority, any purported negligence by defendant's agents would fall within the public duty doctrine and preclude liability in the absence of a finding of a special duty or relationship, to be discussed *infra*.

Plaintiffs also argue that the public duty doctrine is inapplicable because R.C. Chapter 3743 creates a duty to a special class of people, fireworks store customers and employees, and that these statutory provisions are not meant to benefit the general public. We do not construe the provisions of R.C. Chapter 3743 so narrowly. Rather, we conclude that the statutes at issue, "requiring state agencies to inspect and enforce safety standards," were enacted to protect "the public generally against unsafe conditions." *Shelton, supra,* at 131. See, also, *Gill v. Caesar's, Inc.*, 1986 Ohio App. LEXIS 5302 (Jan. 16, 1986), Cuyahoga App. No. 49886, unreported ("Statutes requiring inspection, and enforcement of safety standards were enacted to protect the general public, and not to create a duty toward any one person.") We note that in *Pizza v. Sunset Fireworks Co.* (1986), 25 Ohio St. 3d 1, 5, 494 N.E.2d 1115, the Ohio Supreme Court "liberally construed the Fireworks Code so as to promote the health, safety and welfare of the people of the state." The court noted that "the very fact that this chapter was placed within Title 37 of the Revised Code which relates to health, safety and morals lends support to the courts' conclusion." *Id.* at 4. See, also, *Van Camp v. Riley* (1984),

16 Ohio App. 3d 457, 460, 476 N.E.2d 1078 (construing R.C. Chapter 3743 to promote the public safety; "the enactments of the legislature in the exercise of its police power are statewide in their application, and deal *** with businesses which, if not regulated, would pose a threat to the health, safety and welfare of all the people of the state.")

It has been noted that "the public duty doctrine implicitly presupposes that the state's duty to the public is a duty that is not shared by private parties, [and] cases finding that the state or other governmental unit owed a duty only to the public involve uniquely governmental functions." *Jones v. Ohio Dept. of Health, Div. of Pub. Health Laboratories* (1990), 69 Ohio App. 3d 480, 487-488, 591 N.E.2d 245. Here, defendant's statutory duty regarding the licensing, inspection and regulation of wholesalers of fireworks implicates uniquely governmental functions not engaged in by private parties, and we agree with the trial court that the conduct at issue falls within the public duty doctrine. See, *e.g., Ashland Cty. Bd. of Commrs. v. Ohio Dept. of Taxation* (1992), 63 Ohio St. 3d 648, 654, 590 N.E.2d 730 ("This court has regularly found that statutory duties imposed upon state officials to regulate, inspect *** [or] license *** are 'public' duties" and "do not flow to any private individual.") Thus, any alleged negligence in failing to properly perform an inspection did not involve a duty of care to any particular individual or class of individuals.

Having concluded that the conduct at issue relates to a duty imposed by law that is owed to the public in general, we next consider whether the trial court erred in finding the absence of a special duty or relationship as an exception to the public duty doctrine. *Franklin v. Columbus* (1998), 130 Ohio App. 3d 53, 60, 719 N.E.2d 592. As previously noted, in order to establish such a special duty or relationship, the

following elements are required: (1) an assumption by the governmental entity of a duty to act on behalf of the injured party either through promises or actions; (2) knowledge on the part of the governmental agents that inaction could lead to harm; (3) some form of direct contact between the governmental agents and the injured party; and (4) the injured party's justifiable reliance on the governmental entity's affirmative undertaking. *Sawicki, supra,* at paragraph four of the syllabus.

In the present case, at least two of the elements required by *Sawicki* are not present. Specifically, the facts do not show any direct contact between defendant and the injured parties, nor do the facts indicate that the injured parties relied upon any affirmative undertaking to act on their behalf. We note that plaintiffs do not specifically discuss the individual elements of the *Sawicki* analysis, but rather argue in general that a special relationship was created by the fact that R.C. 3743.44 and 3743.45 require customers to identify themselves on purchaser's forms.[1] We disagree.

Although there is no evidence that any of the plaintiffs in this case completed or signed a purchaser form, even assuming such evidence, plaintiffs would have failed to establish a "special relationship." In *Sawicki, supra,* the Ohio Supreme Court held that "a telephone conversation between

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[1] R.C. 3743.44 pertains to sales to nonresidents, and R.C. 3743.44(B) states in part that "[a] licensed *** wholesaler selling fireworks under this section shall require the purchaser to complete a purchaser's form." The form is required to include the purchaser's name and address, date of purchase, the destination to which the fireworks will be transported and the purchaser's signature. R.C. 3744.45 contains a similar form requirement for sales of fireworks to Ohio residents.

a member of the general public and a police department, wherein the caller requests help and the police operator says he will send help, is insufficient as a matter of law to establish a special relationship between the caller and the police." 37 Ohio St. 3d at 232-233. The facts of the instant case are more tenuous than the facts in *Sawicki*, and we conclude that the purchaser's forms at issue, indicating that a purchaser will take fireworks out of the state, did not create a special relationship between defendant and the injured parties.

Plaintiffs also assert that Ohio should abandon the public duty doctrine, arguing that the doctrine "is nothing more than a form of sovereign immunity created by the courts to avoid imposing responsibility once the legislature has abrogated sovereign immunity." Plaintiffs maintain that they "do not believe" the Ohio Supreme Court would recognize this doctrine as defendant seeks it to be applied in this case. Finally, plaintiffs concede that this court "must follow the dictates of past Supreme Court decisions, and raise this issue to preserve it for further review by the Supreme Court."

As noted by plaintiffs, this court is bound to follow the law as determined by the Ohio Supreme Court. See, *e.g.*, *Consolidated Rail Corp. v. Forest Cartage Co.* (1990), 68 Ohio App. 3d 333, 341, 588 N.E.2d 263 ("All trial courts and intermediate courts of appeal are charged with accepting and enforcing the law as promulgated by the Supreme Court not changing, modifying or ignoring that law.") In *Sawicki, supra,* the Ohio Supreme Court reaffirmed the public duty doctrine, and the court has continued to apply the doctrine in subsequent cases. See, *e.g.*, *Delman, supra,* (public duty doctrine precluded liability against city for real estate inspections conducted pursuant to inspection ordinance); *Williamson v. Pavlovich* (1989), 45 Ohio St. 3d 179, 186, 543 N.E.2d 1242 (enforcement of traffic ordinance was a duty to

the public generally and the failure to perform, or inadequate [*30] performance of this type of duty in the absence of a special relationship is a public and not individual injury); *Hurst v. Ohio Dept. of Rehab. & Corr.* (1995), 72 Ohio St. 3d 325, 329, 650 N.E.2d 104 ("Because appellee has failed to establish the existence of a special duty owed the decedent by the state, the public duty rule applies to bar liability on the part of the Adult Parole Authority"). Thus, inasmuch as the Ohio Supreme Court has not abolished the public duty doctrine, we decline any invitation to declare abandonment of the doctrine.

Finally, we note that one of the primary cases relied upon by plaintiffs is the Alaska Supreme Court's decision in *Adams v. State* (Alaska 1976), 555 P.2d 235, in which the court imposed liability upon a governmental entity for failing to adequately enforce fire and safety codes as part of an inspection. In *Adams*, the court found the public duty doctrine to be inconsistent with the legislature's abrogation of sovereign immunity. As previously noted, however, the Ohio Supreme Court, in *Sawicki, supra,* rejected this rationale, holding that "the public duty rule, and the special duty exception, comprise a doctrine which is independent of, and accordingly survived the abrogation of, sovereign immunity." *Id.* at paragraph three of the syllabus. We also note that the holding of the *Adams* case was subsequently abrogated by statute. See *Wilson v. Municipality of Anchorage* (Alaska 1983), 669 P.2d 569, 571 (noting that in 1977, following the decision in *Adams, supra,* "the legislature amended AS 09.65.070 to preclude municipal liability in actions based on the inspection of private property for violations of statutes, regulations and ordinances, or for hazards to health or safety.")

In the present case, the trial court held that "defendant owed no special duty to plaintiffs that was separate from its duty owed to members of the general public." In so holding, the trial court adhered to legal principles that "the government is not amenable to suit by a private individual for a breach of a public duty," and that public duties "will not form the basis for liability *** in the absence of a special relationship." *Ashland Cty. Bd. of Commrs., supra,* at 654. We agree with the trial court's determination that the circumstances of this case, while undeniably tragic, fell within the public duty doctrine and did not give rise to a special relationship between defendant and the injured parties. Thus, in the absence of the existence of a duty, we conclude that the trial court properly found in favor of defendant on plaintiffs' negligence claim. Accordingly, plaintiffs' first and second assignments of error are overruled.

Based upon our disposition of the first and second assignments of error, the issues raised under the third and fourth assignments of error, regarding the expert testimony of defendant's witness and the court's finding that the criminal act of a third party was unforeseeable, are rendered moot.

Based upon the foregoing, plaintiffs' first and second assignments of error are overruled, plaintiffs' third and fourth assignments of error are rendered moot, and the judgment of the trial court is hereby affirmed.

Judgment affirmed.

GEORGE, J., concurs.

KENNEDY, J., concurs separately.

GEORGE, J., retired, of the Ninth Appellate District assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

KENNEDY, J., concurring separately.

I concur with the majority but write separately.

I recognize that, in 1988, the Ohio Supreme Court, in *Sawicki v. Ottawa Hills* (1988), 37 Ohio St. 3d 222, 525 N.E.2d 468, acknowledged the "public duty rule" and we are, therefore, bound to follow the rule in this case. However, with great respect and deference, I suggest that this may be an appropriate case to revisit the holding in *Sawicki* and I would respectfully invite our state's highest court to once again consider reviewing the public duty doctrine.

APPENDIX E

INTHE COURT OF CLAIMS OF OHIO

Case No. 97-01325

[Filed October 29, 1999]

JOHN WALLACE, Individually, etc., et al.
Plaintiffs

v.

OHIO DEPARTMENT OF COMMERCE, etc.
Defendant

In their complaint, plaintiffs allege that defendant's negligence was the proximate cause of the injuries suffered by plaintiffs and their decedents. On July 3, 1996, a fire occurred at the Ohio River Fireworks Company's store in Scottown, Ohio. As a result of the fire, nine people were killed and eleven people sustained serious injuries. The fire was intentionally set by Todd Hall, a mentally impaired individual, who was accompanied by three other youths who took advantage of Hall's impairment.

At the time of the incident, Flying Dragon; Inc. d/b/a The Ohio River Fireworks Company was licensed as a wholesaler

of fireworks pursuant to R.C. 3743.16. The wholesaler license is the only type of fireworks sales license issued by the state and, during the time at issue, permitted its holder to sell both "Class C" and "Class B" fireworks.[1] Class C fireworks are common "backyard fireworks" that are intended for use by the general public. Class B fireworks contain greater amounts of explosive material than Class C, and can only be sold to licensed exhibitors for use at public fireworks exhibitions. This state has enacted strict laws to regulate the sale of fireworks; that is, any non-licensed purchaser who is a resident of the State of Ohio is required to complete a purchase form and transport the purchased fireworks out-of-state within a forty-eight hour period, See R.C. 3743.45.[2]

The Ohio River Fireworks store was located on a hill in a rural area of Lawrence County. It was constructed in such a manner that employees working outside of the store could observe anyone approaching the store from the parking lot. The store consisted of a thirty-two by forty-foot concrete block building with a metal roof supported by wooden rafters and a concrete floor. The main (south) entrance door and two windows were located on the front wall; a second door was situated on the east side of the north wall at the rear of the store. Wooden storage shelves were built against each interior wall, and three additional rows of metal shelves created four isles within the store. The interior shelving ran parallel to the front and rear walls. Additional storage for the Class C fireworks was provided by six trailers that were parked along

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[1] Effective June 30, 1997, fireworks classifications were changed from Class B and C to 1.3G and 1.4G. See R.C. 3743.01.

[2] Non-resident purchasers are required to transport fireworks out-of-state within seventy-two hours after the sale. See R.C. 3743.44.

the east side of the store. The main showroom building was used for the sale of Class C fireworks to the general public. A separate building that contained the Class B fireworks was located southwest of the main building. The premises was surrounded by a chain link fence with a single entrance gate that allowed access to the main building.

The main building was outfitted with a "full suppression" overhead sprinkler system that received water from an elevated pond located on a hill behind the store.[3] The water flow to the sprinkler system was manually controlled by a valve that was located inside the store on the back wall. The valve could be cycled from the "off" to the "on" position in less than one minute. A pressure gauge in the northwest corner of the building displayed the static water pressure in the sprinkler system. The sprinkler system's control valve had been turned off some time prior to the fire, rendering it inoperable.

On the day of the incident, Richard Pruitt, a store employee, observed Todd Hall and three other individuals walk through the entrance gate and approach the store. As Hall walked into the store, another employee working at the outside cash register shouted to Pruitt that Hall was carrying a lit cigarette. Pruitt quickly followed Hall into the building and encountered him standing next to a stack of "crackling wheel" fireworks that were displayed on a shelf near the northwest corner of the building. Pruitt yelled for Hall to stop after observing him use the cigarette to light the fuze of

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[3] Additional safety requirements for showroom structures were enacted effective June 30, 1997, that include approved fire detection, fire suppression, smoke exhaust and smoke evacuation systems. See R.C. 3743.25.

a firework that immediately began to emit sparks. As Pruitt attempted to extinguish the exploding fireworks by "stomping" on them, Hall exited through the rear door. When he realized that the fire was out of control, Pruitt warned the remaining occupants to leave the building and then fled the building through the front (south) exit.

After exiting the building, Pruitt pursued Hall and enlisted the help of others to restrain him until the police arrived. During the chase, Pruitt observed that Hall was both physically and mentally impaired. Pruitt also brought Hall's three companions back inside the gate that surrounded the store. By the time Pruitt returned to the store, the building was engulfed in smoke and flames.

Extensive evidence was presented at trial that addressed the effectiveness of a functional sprinkler system which would reduce toxic smoke and fumes and increase survivability during a fireworks fire. After examining and analyzing the Ohio River Fireworks store's sprinkler system, plaintiffs' fire protection engineering expert, David Demers, determined that the system was capable of functioning if the water supply had not been shut off. Demers further opined that the heat from the fire would have caused the first sprinkler head to open within thirty seconds after the fireworks were ignited, and that the sprinkler's discharge would have been sufficient to limit the fire and the resulting toxic gases, including the carbon monoxide (CO) gas which was the principle cause of the deaths of plaintiffs' decedents.

The build-up of gases during the first thirty seconds after a fire begins is significant because, within that short amount of time, the volume of CO produced as a byproduct of fireworks combustion creates a lethal atmosphere. Based upon an analysis of crackling wheel fireworks, defendant's expert,

Dr. John Hoffman, determined that a conservative estimate for the atmospheric level of CO in the store after a thirty-second burn period was eight percent, or 80,000 parts per million (ppm).[4] Even at CO levels significantly lower than 80,000 ppm, CO enters the blood stream and combines with normal hemoglobin to produce carboxyhemoglobin, which prevents the absorption of oxygen. The lack of oxygen to body tissues and organs, including the brain, results in mental disorientation followed by physical incapacitation.

Although it is difficult to accurately determine the level of CO that existed in the store in the moments following the onset of the blaze, the expert testimony presented at trial by both parties described an environment that would quickly cause incapacitation. Plaintiffs' toxicology expert, Dr. Yves Alarie, testified that at an atmosphere of 20,000 ppm of CO, survivability would be limited to approximately four and one-half minutes. Defendant's pathology expert, Dr. George Nichols, opined that at a CO level of 80,000 ppm, incapacitation would occur after only two or three breaths.

In addition to CO, other highly toxic gases that were emitted by the burning fireworks, such as hydrogen cyanide and formaldehyde, also would affect survivability. Given the lethal environment that developed within thirty seconds after the fireworks were ignited, the court finds that even a fully

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[4] In giving weight to the testimony of Dr. Roffman, the court considered the fact that his analysis was based upon crackling wheel fireworks that were similar, but not identical, to the type of fireworks that Hall set on fire. The court also considered that the crackling wheels represented a relatively small portion of the explosives that burned in the fire. Because of this limitation, the court finds that it is likely that the actual CO level in the store was even higher than the level computed by Dr. Hoffman.

functioning sprinkler system would not have completely prevented plaintiffs' injuries. However, the court also finds that defendant's argument that an operational sprinkler system would have made little or no difference in the outcome is implausible.

DEFENDANT'S DUTY TO INSPECT

In order to sell fireworks in Ohio, to either consumers or a licensed exhibitor, the seller must first submit an application to obtain a wholesaler's license to the state fire marshal. See R.C. 3743.15. Defendant's duty to review an initial application and subsequent annual applications to renew a license is set forth in R.C. sections 3743.16 and 3743.17.

At the time of the incident, R.C. 3743.16 provided, in pertinent part that:

> (A) If a person submits an application for licensure as a wholesaler of fireworks *** the fire marshal shall review the application and *** inspect the premises on which the fireworks would be sold, and determine whether the applicant will be issued the license. In determining whether to issue the license, the fire marshal shall consider the results of the inspection, and the information set forth in the application, and shall decide whether the applicant and the premises on which the fireworks will be sold conform to sections 3743.15 to 3743.21 of the Revised Code and the rules adopted by the fire marshal ***.

R.C. 3743,17 provides that:

> (A) The license of a wholesaler of fireworks is effective for one year beginning on the first day of

> December. The fire marshal shall issue a license only on that date and at no other time. If a wholesaler of fireworks wishes to continue engaging in the wholesale sale of fireworks at the particular location after its then effective license expires, it shall apply not later than the first day of October for a new license pursuant to section 3743.15 of the Revised Code. The fire marshal shall send a written notice of the expiration of its license to a licensed wholesaler at least two months before the expiration date.

Between 1991 and the date of the incident, defendant's employees conducted at least twelve inspections of the Ohio River Fireworks Company's store premises, including both the statutorily required annual inspections and additional seasonal inspections during the peak fireworks season which is May to July Fourth. The findings of each annual and seasonal inspection were recorded on a "fire safety inspection occupancy report form 903" that specifically listed the results of an examination of the sprinkler system. Each form 903 inspection report that was submitted as evidence at trial confirmed that there had been a satisfactory sprinkler test. However, a memorandum report written on July 11, 1994, states that Fire Safety Inspector Thomas Baker conducted a non-scheduled walk-through inspection of the store and discovered that the water control valve was closed and that the sprinkler system was shut down. (Plaintiffs' Exhibit 10.) The October 17, 1994, annual inspection, and all subsequent inspections, noted that the sprinkler system had positive water pressure.

The last annual relicensing inspection of the fireworks store was conducted on October 12, 1995, by James Saddler, who has been employed by defendant as a certified fire safety inspector since 1983. Inspector Saddler's assigned region

included Lawrence County where he had conducted numerous inspections of the Scottown store prior to October 1995. Saddler was also responsible for inspecting four hundred fifty to five hundred other buildings each year, including hospitals, schools, daycare centers and nursing homes. Saddler testified that the store was required to have an automatic sprinkler system and that he checked the sprinkler and its connected "water gong" alarm during each inspection. The October 12, 1995, annual report noted a satisfactory sprinkler test and Saddler recommended approval of the license renewal.

In addition to defendant's statutory duty to annually inspect fireworks facilities during the process of issuing and renewing a wholesaler's license, defendant conducted periodic seasonal inspections to ensure code compliance. Defendant's authority to conduct additional inspections is addressed in R.C. 3743.21 which states, in pertinent part, that:

> (A) The fire marshal *may* inspect the premises, and the inventory, wholesale sale, and retail sale records, of a licensed wholesaler of fireworks during the wholesaler's period of licensure to determine whether the wholesaler is in compliance with sections 3743.15 to 3743.21 of the Revised Code and the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code. (Emphasis added.)

Pursuant to R.C. 3743.21(B), if defendant's inspectors discover a code violation during an inspection, they have the discretion to determine the appropriate action required to remedy the nonconformity. R.C. 3743.21(B) states in part :

> (B) If the fire marshal determines *during an inspection* conducted pursuant to division (A) of this section that a wholesaler is not in compliance with sections

> 3743.15 to 3743.21 of the Revised Code and the rules adopted by the fire marshal pursuant to section 3743.18 of the Revised Code, he *may* take one or more of the following actions, whichever he considers appropriate under the circumstances:
> (1) Order, in writing, the wholesaler to eliminate, correct, or otherwise remedy the nonconformities within a specified period of time;
> (2) Order, in writing, the wholesaler to immediately cease its operations, if a fire or explosion hazard exists that reasonably can be regarded as posing an imminent danger of death or serious physical harm to persons. *** (Emphasis added.)

On May 24, 1996, Daniel Lehman, who was in charge of all fire safety inspectors at the Fire Marshals' Office at the time of the incident, issued a memorandum that directed defendant's inspectors to conduct at least one seasonal inspection of all licensed fireworks facilities during the period of May 24, to July 4, 1996. (Plaintiffs' Exhibit 24.) The seasonal inspection was to be conducted in addition to the annual licensing inspection required by R.C. sections 3743.16 and 3745.17. However, defendant's agents did not complete a seasonal inspection of the Scottown fireworks store in 1996 because Lehman decided to postpone the inspection until investigators had conducted an investigatory "bust-buy" operation.

Lehman authorized the bust-buy operation as a result of a complaint that was received by the Fire Marshal's Office on or about June 7, 1996, from a competitor of the Ohio River Fireworks store. The complaint alleged that the store's employees were selling Class B fireworks without verifying the purchaser's exhibitor's license.

The bust-buy took place on June 28, 1996, by two fire safety inspectors and an arson investigator. Thomas Baker, the fire safety inspector who had found the store's water control valve in the closed position in July 1994, was accompanied by fire safety inspector Michael Kraft and Donald Eifler, an arson investigator. After obtaining a search warrant and a body wire from local law enforcement officials, Eifler entered the fireworks store wearing the body wire, which enabled Kraft and Baker to monitor Eifler's conversation with store employees. Kraft and Baker remained in their car while Eifler purchased $100 worth of Class B fireworks, without being asked to produce an exhibitor's license. After Eifler completed the transaction, Kraft entered the main store building to retrieve the money used in the bust-buy. Although there was conflicting testimony at trial regarding the amount of time Eifler and Baker remained in the store, it is clear that their objective was to complete the bust-buy operation and that they did not perform a safety inspection on June 28, 1996.

Plaintiffs specifically allege that defendant was negligent and breached its duty to properly perform a seasonal inspection at the fireworks store pursuant to the May 24, 1996, memorandum issued by Lehman that directed defendant's fire safety inspectors to conduct at least one seasonal inspection of all licensed fireworks facilities before July 4, 1996, in addition to the annual licensing inspection required by R.C. sections 3743.16 and 3743.17. In order to prevail upon their claim of negligence, plaintiffs must prove by a preponderance of the evidence that defendant owed them a duty, that it breached that duty, and that the breach proximately caused their injuries. *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282.

Plaintiffs assert that defendant breached an affirmative duty to inspect the Ohio River Fireworks Company's facilities during the peak fireworks season. Defendant contends that it fully complied with its statutory duty to perform an annual inspection of the fireworks premises, that a decision regarding the manner and timing of any additional inspections involved a high degree of discretion and that those decisions were made in accordance with defendant's regulatory function.

Pursuant to R.C. 2743.02(A) (1), the state waives its immunity from liability and consents to be sued for those causes of action as brought "between private parties." Furthermore, "once the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities." *Reynolds v. State* (1984), 14 Ohio St.3d 68, paragraph one of the syllabus. However, "the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Id.*

In the instant case, Lehman issued a directive on May 24, 1996, requiring defendant's fire safety inspectors to conduct additional, cursory inspections to ensure compliance during the peak fireworks season. As noted above, Lehman had the discretion to order additional inspections pursuant to R.C. 3743.2l(A). The court recognizes that such a decision, especially in the context of ensuring compliance with fire safety regulations, necessarily involves a high degree of discretion. Likewise, Lehman's subsequent decision to postpone the seasonal inspection at the Scottown facility in order to investigate a complaint of improper sales of Class B fireworks, also involved a high degree of discretion.

Even if the court were to find that defendant had acted in a negligent manner by performing or failing to perform its duty to inspect, plaintiffs could not maintain their cause of action unless defendant owed plaintiffs a special duty that was distinct and separate from the duty it owed to the general public, thereby avoiding the public duty doctrine. *Robinson v. Office* of *Disciplinary Counsel,* (Aug. 26, 1999), Franklin App- No. 98AP-1431, unreported. *Sawicki v. Ottawa Hills* (1988), 37 Ohio St.3d 222.

The public duty doctrine is a common law defense that exists independent of sovereign immunity. *Sawicki, supra,* at paragraph three of the syllabus. The rule is used to determine whether plaintiffs can establish the special duty element of a cause of action. The rule provides that "[w]hen a duty which the law imposes upon a public official is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, is generally a public and not an individual injury." *Id.,* paragraph two of the syllabus. The public duty doctrine is not, however, an absolute defense and its application may be diminished if plaintiffs can show that the special duty exception applies. A special duty exists if: 1) the governmental entity assumes, through promises or actions, an affirmative duty to act on behalf of the injured party; 2) the entity's agents know that inaction could lead to harm; 3) the entity's agents and the injured party have some form of direct contact; and, 4) the injured party justifiably relies on the entity's affirmative undertaking. *Id.,* paragraph four of the syllabus.

Plaintiffs assert that the public duty doctrine should not be applied to the facts of this case, both because the fire marshal did not act pursuant to a statutory duty and because a special duty is owed to a fireworks store's employees and its customers. Plaintiffs specifically claim that although the fire

marshal had a statutory duty to perform an annual inspection, there was no statutory duty to perform a seasonal or operational inspection during the fireworks season. However, as stated above, the court finds that pursuant to R.C. 3743.21(A), the fire marshal has the express authority to conduct an inspection of the fireworks facility's premises, including its inventory and records, to determine whether the store was in compliance with applicable statutes and rules adopted by the fire marshal. The court further finds that the language of R.C. 3743.21(A) does not limit the fire marshal's authority to conduct only annual inspections. Rather, it provides that he "may inspect" at any time "during the wholesaler's period of licensure to determine whether the wholesaler is in compliance." Accordingly, the court finds that defendant did not act beyond its statutory public duty and, therefore, did not assume an affirmative duty by performing seasonal inspections.

Plaintiffs' assertion that the May 28, 1996, bust-buy constituted an "inspection," and that, as a consequence, defendant voluntarily assumed a common law duty, is also without merit. Once the fire marshal's office received the complaint regarding the alleged illegal sales of Class B fireworks at the Scottown facility, it had the statutory authority to respond to the complaint. Moreover, Lehman specifically directed that an inspection was not to be performed until the bust-buy operation was completed.

As the Supreme Court of Ohio observed in *Sawicki, supra, a* commitment of an agency's resources to a particular individual or group does not remove those individuals from the class of the general population and create a special duty. *Sawicki, supra,* at 233. It is well established that no special relationship exists simply because a member of the general public requests assistance from law enforcement. *Id.* at 232-

233; *Burgess v. Doe* (1996), 116 Ohio App.3d 61. In the case at bar, defendant's employees were acting in a law enforcement capacity at the time of the bust-buy, and no special relationship existed between plaintiffs and defendant as a result of that operation. Furthermore, unlike the facts in *Sawicki,* defendant's employees were not even responding to a request for assistance from plaintiffs; rather, they were acting pursuant to a statutory duty. Therefore, the court finds that defendant owed no special duty to plaintiffs that was separate from its duty owed to members of the general public.

Both the Supreme Court of Ohio and the Tenth District Court of Appeals have also applied the public duty doctrine, as stated in *Sawicki,* to the situation in which a state agency made a decision involving a high degree of discretion, but was alleged to have negligently *implemented* the decision. *Anderson v. Ohio Dept. of Ins.* (1991), 58 Ohio St.3d 215; *Robinson, supra.* In *Anderson,* the Supreme Court held that:

> *** There is no public policy requiring government to guarantee the success of its efforts. When the government entity is performing a self-imposed protective function ***, the individual citizen has no right to demand recourse against it though he is injured by its failure to efficiently perform such function. Any ruling to the contrary would tend to constitute the Commonwealth an insurer of the quality of services its many agents perform and serve only to stifle government's attempts to provide needed services to the public which could be otherwise effectively supplied.

Anderson, at 219, quoting *Commonwealth Dept. of Banking & Securities v. Brown* (1980), 605 S.W.2d 497.

Once Lehman made the decision to postpone the seasonal inspection and execute the bust-buy, Kraft, Eifler and Baker were selected to implement the operation. The evidence presented at trial established that defendant's agents were directed to make the purchase of Class B fireworks and then quickly leave the premises without conducting a seasonal safety inspection. During his testimony, Baker described the situation as a "hostile environment." The court finds that the testimony regarding the inherent danger of conducting an undercover bust-buy in a remote location, such as the Scottown facility, was credible. Defendant's agents were not negligent in implementing the bust-buy operation.

The court concludes that the implementation of the bust-buy was directed toward the limited goal of purchasing Class B fireworks and was not a safety inspection. The court further finds that, pursuant to the holdings of *Sawicki* and *Anderson, supra,* even if defendant's agents were negligent in implementing the discretionary decision to forego a seasonal inspection and conduct the operation, defendant's duty relating to the bust-buy is one owed to the general public, not individuals, and, therefore, defendant did not breach a duty to plaintiffs. The court finds that plaintiffs have failed to demonstrate an individual duty, as opposed to a public duty. Therefore, plaintiffs cannot maintain an action in negligence against defendant.

Plaintiffs also assert that defendant was obligated to seize fireworks and to close the fireworks facility, pursuant to R.C. 3743.21, because it had knowledge that a fire or explosion hazard existed which could reasonably be regarded as posing an imminent danger of death or serious physical harm. However, as discussed above, R.C. 3743.21(2) provides that defendant has discretion in acting to remedy a hazardous condition and that defendant "may take one or more ***

actions whichever, the fire marshal considers appropriate under the circumstances." Baker testified that it was not defendant's practice to seize fireworks from a licensed dealer, and that a seizure was appropriate only when "bootleggers," who did not possess a wholesaler's license, were illegally selling fireworks. Contrary to plaintiffs' characterization that the Ohio River Fireworks Company sold "illegal" Class B fireworks, the court finds that the business was properly licensed to sell both Class B and Class C fireworks and that defendant's agents were not negligent for failing to confiscate the store's inventory. Furthermore, even if defendant had seized the Class B fireworks, it would not have prevented the tragic fire because the Class B storage building was not involved in the fire. Only Class C fireworks were located in the main store where the fire occurred. Similarly, plaintiffs' assertion that defendant was negligent for failing to remedy alleged violations regarding the storage trailers is also without merit because the trailers were not involved in the fire.

Plaintiffs also argued that defendant's agents should have discovered that the sprinkler water control valve was closed. However, defendant's agents were on the premises for the sole purpose of making a bust-buy and not to perform an inspection. Moreover, the sprinkler system was fully functional during all of the scheduled inspections, and employees were instructed to turn on the system when members of the fire marshal's office were present.

THE INTERVENING CRIMINAL ACT

Plaintiffs also have the burden of proving that their injuries were proximately caused by defendant's alleged negligence. An injury is proximately caused by a breach of duty when the injury is the natural and probable consequence of the breach. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140.

ThereEore, a defendant "is not liable for proximately causing an injury if, under all of the circumstances, he did not foresee and, acting as a reasonably prudent person, could not have foreseen the consequences of his alleged negligent acts." *Jeffers, supra,* at paragraph one of the syllabus. Foreseeability is based upon whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of the act. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St.3d 7S, 77.

Defendant contends that the proximate cause of the fire was an intentional criminal act that supersedes any alleged negligence by the Fire marshal's office. Plaintiffs assert that it was foreseeable that a lit cigarette or a match could be present in the store and be used to ignite the fireworks.

Traditionally, an intentional tort or a criminal act committed by a third party constitutes an intervening act that supersedes the negligence of the party creating the risk of harm, and relieves that party from liability. See *Federal Steel & Wire Corp. v. Ruhlin Constr.* Co. (1989), 45 Ohio St.3d 171, 543 N.E.2d 769; *Thomas v. Hart Realty, Inc.* (1984), 17 Ohio App.3d 83; Restatement of the Law 2d, Torts (1965) 469, Section 442B.

Under certain circumstances, Ohio courts have found, as a matter of law, that criminal acts are not foreseeable. See *Doe v. Flair Corp.* (1998) Ohio App. LEXIS 4122 (finding that a sexual assault is an unforeseeable criminal act which supersedes alleged negligence for failing to provide adequate building security). "[W]hen, between negligence and the occurrence of an injury, there intervenes a willful, malicious, and criminal act of a third person which causes the injury but was not intended by the negligent person and could not have been foreseen by him, the causal chain between the

negligence and the accident is broken." *Lamantia v. Sorenson* (Oct. 17, 1991), Cuyahoga App. No. 61316, unreported, quoting, *Popovich v. Pechkurow* (1956), 76 Ohio L. Abs. 200, 202. See, also, *Feichtner v. Ohio Dept. Of Transp.* (1995) , 114 Ohio App.3d 346; *Taylor v. Webster* (1967) , 12 Ohio St.2d 53, 56.

In the instant case, Todd Hall was observed walking into the fireworks store with a lit cigarette cupped in his hand, as if he was attempting to conceal it from view. "No smoking" signs were conspicuously posted on the entrance gate and throughout the store. Before store employees were able to confront him, Hall used his cigarette to intentionally light the fuse of a crackling wheel firework. A chain reaction of explosions followed the ignition that sent smoke and flames around the walls of the store "like a fuse," which created a lethal atmosphere inside the small store within seconds.

The court finds that the criminal act which caused the Scottown tragedy, intentionally lighting a fuse in a fully stocked and heavily populated fireworks store, could not have been foreseen by a reasonably prudent person. The law does not require the prudent person to anticipate the criminal activity of others. See, *Federal Steel & Wire Corp., supra,* at 174. The court concludes that the sole proximate cause of plaintiffs' injuries was Hall's act of arson. Under the totality of the circumstances, this court cannot find that the criminal act of a third party was a foreseeable event for which defendant can be found liable under a negligence theory.

> Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably

> prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated ***.

Hetrick v. Marion-Reserve Power Co. (1943), 141 Ohio St. 347, 358-359.

In his article Reason Comes Before Decision, Judge McCormac observed that:

> The judge should decide independently and initially what the defendant's conduct actually was and let the chips fall as they may in the ultimate determination. There is no justification for finding the facts differently simply because the judge does not believe that binding authority (the legislature or a higher court) has justly determined the consequences of negligent conduct. If the findings of fact are not made first, independent of any consideration of the legal effect thereof, the desired result may control the judge's findings, at least subjectively. If findings of fact are first made and then changed when the judge realizes that those findings will not support the desired result, clearly the process is flawed and the judge has acted unprofessionally.

McCormac, Reason Comes Before Decision, (1994), 55 Ohio St.L.J. 161, 163-164.

This is the most tragic case that this court has ever had before it. However, a judge takes an oath to decide all cases solely on the controlling law and evidence and without fear, favor or sympathy. It was not foreseeable that three boys would use a young, incompetent person to cause such a tragic event.

For the foregoing reasons, judgment shall be rendered in favor of defendant.

/s/_____
Fred J. Shoemaker
Judge

INTHE COURT OF CLAIMS OF OHIO

Case No. 97-01325

[Filed October 29, 1999]

JOHN WALLACE, Individually, etc., et al.
Plaintiffs

v.

OHIO DEPARTMENT OF COMMERCE, etc.
Defendant

The court has considered the evidence and rendered a decision filed herein. Judgment is rendered for defendant. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

/s/
Fred J. Shoemaker
Judge

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APPENDIX F

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction equal protection of the laws.

Ohio Revised Code Section 2743(A)(1)

§ 2743.02 Waiver of immunity of state; personal immunity not available to state

The state hereby waives its immunity from liability, except as provided for the office of the state fire marshal in division (G)(1) of section 9.60 and division (B) of section 3737.221 of the Revised Code and subject to division (H) of this section, and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.